

2. The Trustees are further authorized and empowered, by an acknowledged instrument in writing (with such instrument to be filed with the court, if any, then having jurisdiction over the trust to which such power relates, if such court shall accept such instrument for filing), to revoke any power created by the Trustees pursuant to the provisions of paragraph 1 of this Section B at any time prior to the death of the beneficiary in whom such power was created, and to release, in the manner set forth in Article THIRTEENTH hereof, the right to create such a power. The Trustees shall not be liable for any exercise, release or failure to exercise the authority and power granted to them by the provisions of said paragraph 1 or for the revocation of any power created by them pursuant to the provisions of said paragraph 1, provided they utilize good faith in considering whether or not to exercise or release such power or to cause such revocation, whether such consideration be at their own instance or at the request of an individual who is a beneficiary of a trust hereunder, the guardian or other fiduciary of such an individual, or a member of his or her family.

C. 1. Notwithstanding any other provision in this Trust Agreement to the contrary, if at any time any property is to be placed in a trust under the provisions of any Article of this Trust Agreement, the Trustees shall, if need be, and if it is possible to do so, divide such property and place the same in separate trusts to the end that one such trust shall have an

inclusion ratio of zero, and if any property which is directed to be added to a trust hereunder shall have an inclusion ratio which is different than the inclusion ratio of such trust, the Trustees shall not make such addition but shall instead administer such property in a separate trust under this Trust Agreement; and, in each such instance, the property to be placed or held in such a separate trust shall be held, administered and disposed of by the Trustees pursuant to provisions identical to the provisions of the trust to which, but for the provisions of this paragraph 1, such property would have been placed or added.

2. If, pursuant to the provisions of paragraph 1 of this Section C, any property that would otherwise be held in a single trust hereunder is instead held in separate trusts hereunder, the Trustees of such trusts may, at any time or from time to time, (i) make different tax elections and allocations with respect to each such trust, (ii) expend principal and income and exercise any discretionary power differently with respect to each such trust, (iii) invest each such trust differently, and/or (iv) take all other actions consistent with such trusts being separate entities. Furthermore, the donee of any power of appointment with respect to such trusts may exercise such power differently with respect to each such trust.

D. Notwithstanding the provisions of the foregoing Sections of this Article to the contrary, if any Trustee hereunder is a current beneficiary of the income of any trust here-

under, or may, in the discretion of the Trustees, be a current income beneficiary of any such trust, then, in such event, such Trustee shall not, in his or her capacity as a Trustee of such trust, have any voice or vote or otherwise participate in any decision pertaining to the matters relating to such trust that are addressed in the foregoing Sections of this Article, and, in each such event, the other Trustee or Trustees of such trust shall make all decisions relating to such trust that pertain to such matters.

THIRTEENTH: Release of Powers.

Any beneficiary and any Trustee hereunder may at any time or times release any discretionary power of appointment or discretionary power to distribute principal or income or any other discretionary power hereby given to such beneficiary or Trustee, either with or without consideration, with respect to the whole or any part of the property subject to such power and also in such manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power would otherwise be exercisable, by an instrument signed and acknowledged by the beneficiary or Trustee releasing such power and delivered to (i) each Trustee then acting hereunder (other than the Trustee, if any, who shall have executed such instrument), (ii) the Grantor (or, if the Grantor is not then living, to the executors, administrators or personal representatives of the

Grantor's estate), or (iii) any one or more of the adult individuals to whom or for whose use or benefit the income of any trust hereunder may then be paid or applied. In the event of the release of any such power by any Trustee, the remaining Trustee or Trustees hereunder, if any, may thereafter exercise such power, other than any discretionary power which was not initially vested in such remaining Trustee or Trustees. The release of any power by any Trustee hereunder pursuant to the provisions of this Article shall not be binding upon any Trustee who may thereafter act as a Trustee hereunder unless such power shall have been released by all of the Trustees then in office who are vested with such power by their execution of a signed and acknowledged instrument specifically providing that such release is to be binding upon all successor Trustees hereunder.

FOURTEENTH: Provision With Respect To
Closely Held Businesses.

Without limiting the powers and authority conferred upon the Trustees by Article ELEVENTH hereof but in extension thereof, the Trustees are specifically authorized and empowered, in their discretion, to retain for as long as they, in their discretion, shall deem advisable, any or all shares of stock in any closely held corporation, or any indebtedness owing by any such corporation, or any or all interests in any proprietorship, unincorporated business, partnership, joint venture, realty or

any other asset, whether owned individually, as tenant-in-common, partner or otherwise, regardless of whether such asset or assets shall be producing profits or losses through ownership or operation thereof, and regardless of the percentage of the trusts hereunder which such assets or similar assets may constitute; and their decision to retain and hold any such asset or liability shall be binding and conclusive upon and shall not be subject to question by any person interested, or who may become interested, in any of the trusts hereunder, and the Trustees shall not incur any liability by reason thereof.

FIFTEENTH: Headings.


The Article headings contained herein are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope hereof or the intent of any provision hereof.

SIXTEENTH: Severability.

Should any part, clause, provision or condition hereof be held to be void or invalid, then such invalidity shall not affect any other part, clause, provision or condition hereof, but the remainder hereof shall be effective as though such void

part, clause, provision or condition had not been contained herein.

WITNESS the due execution hereof by the Grantor and Trustees on the day and year first above written.


ARIE GENGHER,
as Grantor


LAWRENCE M. SMALL,
as Trustee


SASH B. SPENCER,
as Trustee

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
:
ORLY GENDER in her individual capacity and :
on behalf of the Orly Genger 1993 Trust (both in :
its individual capacity and on behalf of D & K : Index No. 109749/09
Limited Partnership), :
:
Plaintiff, : Hon. Paul G. Feinman
:
-against- : **AFFIDAVIT OF SAGI GENDER**
:
DALIA GENDER, SAGI GENDER, LEAH : **IN FURTHER OPPOSITION TO**
FANG, D & K GP LLC, and TPR INVESTMENT : **ORLY GENDER'S MOTION FOR**
ASSOCIATES, INC., : **A TEMPORARY RECEIVER**
:
Defendants. :
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SAGI GENDER, being duly sworn, deposes and says:

1. Since October 2004, I have served as President of TPR Investment Associates, Inc. ("TPR"). The company is overseen by an independent Board of Directors, currently made up of Eleanor Parnes and Yonit Sternberg. I respectfully submit this affidavit in opposition to the motion of my sister, Orly Genger, to replace the company's independent Board of Directors and myself with a Court-appointed receiver of her choosing. In particular, I wish to respond to the allegations my sister raises in her recently submitted affidavit.
2. The instant motion is only the latest in a seemingly-endless string of lawsuits and motions that my father Arie has brought and/or instigated in recent years against me personally and the company I run, TPR, since perceiving that I sided with my mother Dalia in their divorce. I have repeatedly proposed to my father and sister that we mediate our family disputes, rather than burden the Courts with them, but they have rejected all offers.

3. At this point, I believe that Arie's and Orly's extreme litigiousness is an end in and of itself. Indeed, testimony in the Delaware trial revealed that Arie's attorney had threatened to "drag ... through the New York courts for four or five years" a party whom he thought would challenge Arie's scheme to maintain corporate control. *See* Exh. A at 364. This strategy has, to some degree, already borne fruit, in that TPR has had to focus its resources and energies on the mortal threat of receivership, rather than on its core business.

4. I am not an attorney; however, I understand that Orly is moving pursuant to CPLR 6401, which requires the movant to establish, by clear and convincing evidence, "a danger that the property will be removed from the state, or lost, materially injured or destroyed." Here, I see no allegation that either I or TPR's Board plan to cause company property to be removed from the state, lost, injured or destroyed. In fact, we do not now, and have never had, such plans. Rather, Orly only complains about events that happened several years ago, and appears to parrot fallacious arguments that her teams of lawyers have recently thought up.

5. I address each of Orly's latest arguments in turn. First, however, I believe it useful to provide the Court with some relevant background facts – most of which are drawn from relevant judicial decisions, and all of which should be beyond dispute.

Background

6. Prior to October 30, 2004, TPR owned 3,000 shares of the stock of Trans-Resources, Inc. ("TRI"), or 52.85% of the company. The Trump Group owned the remaining 47.15% of TRI's stock. On that date, as part of a resolution to his divorce case, Arie caused TPR, which he then controlled, to transfer 794.40 shares of TRI stock to himself, and another 1,102.80 shares of TRI stock to each of the Sagi Genger 1993 Trust (the "Sagi Trust") and the Orly Genger 1993 Trust (the "Orly Trust"), for consideration of \$1.00 per share. Both Trusts, at Arie's behest, also signed lifetime proxies in Arie's favor.

7. In 2008, Justice Milonas, serving as post-divorce arbitrator, found that these transfers were made pursuant to a “significantly misleading” representation by Arie Genger that TRI bore a liability rendering the shares worthless (the so-called “Bogalusa liability”), when in fact the equity value of TRI was actually in the “\$53-67 million range.” Thus, the circumstances that the Court presently confronts are a direct result of Dalia, my mother, being duped by Arie into allowing TPR to rely on a gross misrepresentation of TRI’s value.

8. Later in 2008, the Trump Group learned of the TRI stock transfers. The Trump Group took the position that the conveyances violated TRI’s Stockholder Agreement, rendering them void, and giving the Trump Group the right to purchase the shares from TPR at their 2004 fair market value. As revealed by evidence in the Delaware trial, Arie and Orly’s response was to try to exploit Arie’s own breach of the TRI’s Stockholder Agreement as a means to force the Sagi Trust to sell its shares on the cheap and thereby further enrich themselves.

9. Later in 2008, the Trump Group reached a compromise with Arie whereby the entire Genger family would have been able to retain their TRI shares despite the breach. Arie then reneged on the deal. The Trump Group, in turn, responded by suing Arie in Delaware Chancery Court and TPR in the United States District Court for the Southern District of New York. *See TR Investors, LLC, et al v. Arie Genger*, C.A. No. 3994-VCS (Del. Chanc. Ct.); *Glenclova Inv. Co. v. Trans-Resources, Inc.*, Docket No. 08-CIV-7140 (JFK) (S.D.N.Y.).

10. By this time, I was President of TPR, and came to understand the difficult legal situation into which Arie’s and Orly’s actions had placed TPR. If successful, the Trump Group would have had the right to buy the transferred shares at 2004 fair market value (a lower value than in 2008, as TRI was losing money in 2004). Rather than litigate, the Sagi Trust decided to sell its 1,102.80 TRI shares to the Trump Group and share the proceeds with TPR.

11. The Delaware Chancery Court subsequently ruled that “the Trump Group ...

appropriately purchased the shares transferred to the Sagi Trust.” The Delaware Supreme Court affirmed this aspect of the Chancery Court’s ruling. *See* Exhs. B at 1, C at 33.

12. It was very important to me at that time that my father and sister be offered a similar opportunity with respect to the shares which were purportedly transferred to them. Thus, TPR conditioned its deal with the Trump Group upon their agreeing to a one-week standstill of the litigations, in order to afford Arie and Orly the chance to sell based on comparable terms. *See* Exh. D at 1 (“In connection with certain disputes and litigations between one or more of the Purchasers (and their related parties) and the Company, TPR and Arie Genger (and their related parties), you have asked us to agree not to proceed with the litigations or to bring any further litigations until Thursday, September 4, 2008, at 9:00 a.m. Eastern Standard Time, while the parties attempt to negotiate a resolution of their disputes.”).

13. For the ensuing week, I shuttled back and forth between Arie and the Trump Group, in an effort to broker a business resolution between them that would resolve all of the litigation between the Trump Group and the Genger family. Out of these discussions that I facilitated, the Trump Group offered to waive their objections to the 2004 purported transfers to Arie and Orly. Thus, they would have been allowed to retain the TRI shares that TPR had contracted to transfer to them (shares which Arie and Orly claim, to this day, are worth hundreds of millions of dollars), merely in exchange for Arie recognizing the Trump Group’s majority interest of TPR. Arie and Orly refused these offers.

14. For his part, Arie decided to continue litigating against the Trump Group in the Delaware Chancery Court. Against my advice, Orly followed Arie’s lead. Indeed, so confident was Orly that my father would win his litigation against the Trump Group that she commanded the trustee of the Orly Trust not to sell the Trust’s 1,102.80 shares of TRI, claiming the shares were worth “in excess of \$150,000,000.” In order to ensure that the trustee complied with her

directive, Orly procured an Order from the Surrogate's Court which prohibited the trustee (our mother Dalia) from selling the TRI shares. *See* Exhs. E, F.

15. In sum, Arie and Orly decided to reject my advice and instead roll the dice in litigation. As a result, there are now judicial findings that Arie engaged in "wrongful behavior" and "perfidy," and that Orly gave trial testimony in support of Arie that was "vague, at best" and "undermine[d] her credibility." By contrast, the same court found that the Sagi Trust was "an arguably innocent purchaser for value," and that the transaction by which the Sagi Trust and TPR sold their TRI shares to the Trump Group was final. *See* Exh. G at 12-13, 37, 40.

16. In return for my efforts to bring this family out of this spiral of endless litigation, my father and sister have brought venomous and false charges against me and the company I run, TPR. While it remains my hope that we may someday be able to resolve our issues as a family, I am compelled to respond to Orly's latest charges. As set forth below, TPR has acted properly in all respects, and should be allowed to continue its business undisturbed.

**The Proceeds From the Sale of
the Sagi Trust's TPR Shares**

17. Here, Orly takes completely inconsistent positions. In the instant motion, Orly contends that a Court-appointed receiver should be appointed because I allegedly "dissipated" the sale proceeds from the Sagi Trust's TRI shares, and that instead: "TPR should have received the \$27 million paid for the Sagi Trust TRI Shares" (Emphasis added.) However, Orly is currently pursuing another suit before this Court, in which she has recently obtained two TROs on the ground that the Orly Trust, as opposed to TPR, has beneficial ownership of its TRI shares. In other words, Orly simultaneously claims both: (a) that her own Trust should obtain all of the economic benefit from its 1,102.80 shares of TRI stock; but that (b) TPR, and not the Sagi Trust, whose current beneficiaries include my children, should receive all of the economic benefit for

its 1,102.80 shares of TRI stock. Orly offers no explanation for this inconsistency.

18. Unlike my sister, I have endeavored, as President of TPR, to treat the Orly and Sagi Trust equivalently. Namely, to the extent either Trust owes money to TPR, it should pay that first. When the Sagi Trust settled with the Trump Group, it turned over millions in proceeds to TPR, which exceeded what it then owed TPR under the D&K Note. By contrast, Orly has prevented the Orly Trust from selling its TRI shares like the Sagi Trust did, and so continues to owe TPR over \$4 million. Subject to repayment of that indebtedness, however, TPR has relinquished any claim to the proceeds from the sale of the Orly Trust's TRI shares. This follows the original arrangement by which TPR was to receive full payment of the D&K Note, with the future excess to go to the two Trusts. Orly, by contrast, is seeking a windfall by taking exact opposite positions in related cases.

19. Orly also alleges "improper self-dealing" in connection with the August 22, 2008 letter agreement that TPR entered into with the Trump Group. That agreement only provides that, if TPR is found by a Court to be the record and beneficial owner of the TRI shares at issue, then it shall sell them at their 2004 fair market value as determined by Justice Milonas. *See* Exh. H. TPR, however, has never taken a position as to who has beneficial ownership of the Orly Trust's TRI shares, nor interfered with the Trust's ability to obtain such a determination. Only Orly has obstructed her own trustee's efforts in that regard.

TPR's Bad Debt Deduction
For The D&K Note

20. Next, Orly claims that I have caused "TPR to violate the laws of the United States and Canada," by allowing TPR's tax accountants (who, upon information and belief, remain as Orly's personal accountants) to take a bad deduction in 2002 and 2003 for the amounts owing under the D&K Note. The only basis Orly offers is a letter from Anthony P. Valenti, a licensed

private investigator who is neither a tax attorney nor a CPA. Mr. Valenti, in turn, alleges that TPR should not have taken a deduction for the unpaid D&K Note in 2002 and 2003, but eschews the balance of Orly's claims against me, stating that: "I have not received sufficient information or documents to render findings or opinions."

21. TPR's 2002 and 2003 amended tax returns containing the deduction in question were prepared, executed and filed by qualified tax accountants, and have never been challenged by the I.R.S. or Canadian tax authorities. Nor should they have been. As CPA Samuel Gunther explains in his accompanying Expert Report (*see* Exh. I), the tax deduction: (a) was entirely proper; and (b) in any event, did not cause TPR to pay less taxes. As Mr. Gunther further points out, Mr. Valenti misunderstands or misrepresents the applicable IRS rules, which expressly permit, not prohibit, bad debt deductions by corporations. And Mr. Valenti also concludes that "the parties never intended to collect the [D&K Note]," even though TPR collected \$1.3 million in principal and \$3 million in interest on that Note (*see* Exh. J) – facts which, under IRS rules, make the D&K Note a valid debt.¹

22. In short, Mr. Gunther concludes that the deduction was proper. In a separate, accompanying affidavit, Brian Glasberg, the accountant who prepared the Canadian tax filings, attests that such filings were also compliant with Canadian law. *See* Exh. K.

23. I am very troubled that my own sister, in her malice towards me, would falsely

¹ Mr. Valenti distorts not only the tax rules but also my own testimony in the divorce arbitration, false claiming that I testified that the D&K Note was "never" intended to be collected. In my cited testimony, I actually stated that "there were payments through the year 2000," but that the parties, in my opinion, did not intend to collect the note in connection with the 2002 default notice. *See* Valenti Exh. 2a at 369-70. Nowhere did I state that the D&K Note was not a legally enforceable debt. To the contrary, the parties were then operating under the belief that D&K did not have sufficient assets at that time to pay the Note. That understanding changed with Judge Milonas' decision in early 2008. The decision revealed that D&K, TPR and TRI were not subject to the massive Bogalusa liability, as had been misrepresented by Arie Genger.

and frivolously accuse me of “criminal” actions for allowing TPR’s tax accountants to take tax deductions which, as Mr. Gunther concludes, were lawful and proper.

TPR’s Board of Directors

24. Lastly, Orly characterizes TPR’s independent Board of Directors as my “cronies.” As a small, family-owned company, TPR will naturally seek Board members who are known and trusted within the Genger family. However, that does not make them cronies. Ms. Parnes is a professional fiduciary in Israel. The fact that she is married to David Parnes, a trusted, long-time attorney for Genger-family entities from well before the intra-family litigation, does not render her dishonest or incompetent. As for Ms. Sternberg, Orly’s main charge against her is that she is “Sagi’s cousin.” That is true. That also makes her Orly’s cousin. She is also an honest person and a fine Board member who does not deserve this sort of bile.

TPR’s Corporate Funds

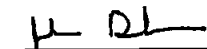
25. Lastly, Orly alleges, without any evidentiary basis, that I have “misappropriated” and “commingled” TPR funds. I have not. Further, I would have hoped that, before swearing under penalty of perjury to a charge that serious, Orly would put forward evidence to substantiate her claims. Instead, she annexes only a deposition transcript in which my testimony contradicts her own characterization of it. At all times as TPR’s President, I have sought to husband TPR’s resources, and I plan to continue in that role for as long as the company’s Board wishes. A receivership, by contrast, would irreparably disrupt TPR’s ongoing business and damage its investments. Unfortunately, I believe that is indeed Orly’s intent.

Conclusion

26. Orly's efforts to destroy TPR have gone on long enough. On behalf of TPR, I respectfully request that the instant motion be denied, and TPR be permitted to return to its real estate business. I thank the Court for its consideration.


SAGI GENGER

Sworn to before me this
14th day of November, 2011


Notary Public

JOHN DELLAPORTAS
Notary Public, State of New York
No. 02DE5054932
Qualified in New York County
COMMISSION EXPIRES 01/29/2014

At the Surrogate's Court held in and for the County
of New York, at the Courthouse, 31 Chambers
Street, New York, New York on the 1 day of
June 2009

July

New York County Surrogate's Court
: DATA ENTRY DEPT.
Date: July 1, 2009

PRESENT: HON. Troy K. Webber
Surrogate

In the Matter of the Application of

ORLY GENDER, as a person interested,
for the removal of DALIA GENDER
as Trustee of the Orly Genger 1993 Trust
pursuant to SCPA §711 (1)

File No.: 0017/2008

**ORDER TO SHOW CAUSE
WITH TEMPORARY
RESTRAINTS**

On reading and filing the annexed Verified Petition of Petitioner, ORLY GENDER, and
the exhibits, verified on the 22nd day of June, 2009, and the memorandum of law in support of
Petitioner's Verified Petition dated June 22, 2009,

LET the Respondent, DALIA GENDER, the sole fiduciary of the Orly Genger 1993
Trust, show cause before Surrogate Troy K. Webber at the Surrogate's Court, 31 Chambers
Street Room 300 5th August 2009 at 10:00 o'clock in the forenoon of that
day or as soon thereafter as counsel may be heard why an order should not be entered:

Sitting at 60 Centre

(a) Enjoining and restraining Respondent, her agents and all other persons
acting on her behalf from withdrawing, selling disposing, transferring, assigning, removing,
pledging, redeeming, mortgaging, encumbering, liening, hypothecating or secreting the Orly
Trust's 19.43% interest in Trans-Resources, Inc., ("TRI"), a closely held corporation, founded by
Arie Genger, Petitioner's father and Respondent's former husband of Respondent and any other
assets which may be remaining in the Orly Trust;

(b) Removing Respondent as Trustee of the Orly Trust for breaching her fiduciary duties, wasting and dissipating the assets of the Orly Trust and imprudently managing and injuring the property committed to her charge;

(c) Surcharging Respondent in the amount of the loss of the value of Orly's interest in TPR as determined by the Court and awarding Petitioner costs and attorneys' fees;

(d) Appointing Michael D. Grohman, Esq. as successor trustee;

(e) Waiving any requirement that Petitioner post an undertaking; and

(f) Granting Petitioner such further relief deemed necessary or proper.

ORDERED that, during the pendency of this proceeding, Respondent ^{and/or her counsel} her agents and all other persons acting on her behalf are temporarily restrained from withdrawing, selling, disposing, transferring, assigning, removing, pledging, redeeming, mortgaging, encumbering, such other and 2) act by Respondent, her agents and all other persons acting on her behalf to assign, mortgage, pledge, redeem, encumber, sell or otherwise alter the Orly Trust's interest in T21 at least 10 days prior to such act and it is further

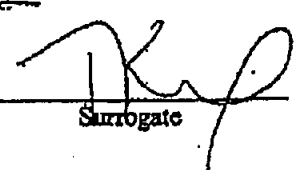
ORDERED that service of a copy of this Order and the papers upon which it is based shall be served on Respondent by personal service at either her residence, located at 200 East

65th Street, Apt. 32W, New York, New York 10021, or any other address at which she can be

located, on or before ^{July 7} June 7, 2009; and it is further

ORDERED, that any responsive papers shall be filed by July 29, 2009.

~~ENTERED~~


Surrogate

EFiled: Jul 23 2010 3:21PM EDT
Transaction ID 32302253
Case No. 3994-VCS



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TR INVESTORS, LLC, GLENCLOVA
INVESTMENT CO., NEW TR EQUITY I,
LLC, NEW TR EQUITY II, LLC, and
TRANS-RESOURCES, INC.,

Plaintiffs,

v.

ARIE GENDER,

Defendant.

C.A. No. 3994-VCS

ARIE GENDER,

Counterclaim Plaintiff,

v.

TR INVESTORS, LLC, GLENCLOVA
INVESTMENT CO., NEW TR EQUITY I,
LLC, NEW TR EQUITY II, LLC, and
TRANS-RESOURCES, INC.,

Counterclaim Defendants.

MEMORANDUM OPINION

Date Submitted: April 26, 2010

Date Decided: July 23, 2010

Thomas J. Allingham II, Esquire, Anthony W. Clark, Esquire, Robert A. Weber,
Esquire, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington,
Delaware, *Attorneys for Plaintiffs.*

Donald J. Wolfe, Jr., Esquire, Brian C. Ralston, Esquire, Scott B. Czerwonka, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Michael P. Carroll, Esquire, Avi Gesser, Esquire, DAVIS POLK & WARDWELL LLP, New York, New York, *Attorneys for Defendant.*

STRINE, Vice Chancellor.

I. Introduction

This dispute over the control of Trans-Resources, Inc. (“Trans-Resources”) is between the company’s founder and former chief executive officer, Arie Genger, and the plaintiffs, who provided capital to Trans-Resources when the company was in financial distress. The plaintiffs are all entities controlled by the Trump family, led by Jules Trump and his brother Eddie Trump (collectively, with the plaintiffs, the “Trump Group”). Jules Trump was a long-time friend of Arie Genger, and he was happy to help Genger when Trans-Resources neared insolvency in 2001.

In return for retiring nearly all of Trans-Resources’ outstanding bonds, the Trump Group received a minority stake in the company and a number of protections in a stockholders agreement (the “Stockholders Agreement”). The Stockholders Agreement prohibited either party from transferring their shares in Trans-Resources to anyone other than a limited number of permitted transferees. That prohibition against transfer was particularly important to the Trump Group, which was concerned that Genger might transfer his shares that were held through an entity under his control, TPR Investment Associates, Inc. (“TPR”), to a member of his family. A bitter dispute had arisen between Genger and his son, Sagi Genger, during the time Genger’s marriage unraveled in the early 2000s, and the Trump Group wanted no part of the family drama.

In 2004, Genger caused TPR to transfer its shares in Trans-Resources, subject to an irrevocable proxy in his favor, to his children’s trusts (the “2004 Transfers”), under a settlement in the contentious divorce between him and his wife. Because those trusts were not permitted transferees, the 2004 Transfers violated the terms of the Stockholders

Agreement. Under the terms of the Stockholders Agreement, that violation rendered the transfers ineffective and gave the Trump Group the right to acquire the shares that were transferred.

But Genger did not notify the Trump Group of the transfers at that time, and thereby deprived the Trump Group of its right to declare the transfers void or exercise its right to acquire the shares in 2004. Genger claims that he mentioned the 2004 Transfers to Jules Trump during a private conversation in 2004, but his testimony did not convince me that this was true. The most convincing reading of the evidence is that the Trump Group did not receive notice of the 2004 Transfers until nearly four years later, when Genger once again asked Jules Trump for help when Trans-Resources was in financial distress. Moreover, informal notice to Jules Trump would not constitute the notice that was required to be given to the Trump Group entities under the Stockholders Agreement.

By 2008, Trans-Resources' bank was unwilling to negotiate with Genger, so Genger asked Jules Trump not only for money but also to negotiate a reduction in Trans-Resources' debt with the bank. The evidence shows that, while Genger and the Trump Group were negotiating the terms of the second round of funding, Genger disclosed for the first time that the 2004 Transfers had occurred.

Although shocked at Genger's failure to notify him of the 2004 Transfers, Jules Trump nevertheless negotiated a reduction in Trans-Resources' debt and agreed to pay that debt in return for voting control of the company. Genger initially agreed to those terms as a compromise for the Transfer violation, but, after securing an alternative source of financing, backed out of the deal. Angered that he had favorably renegotiated Trans-

Resources' debt obligations and that the Trump Group was left without their key part of the bargain, Jules Trump initiated litigation and also contacted Sagi Genger in order to negotiate a deal with both TPR and the trust controlled by Sagi Genger (the "Sagi Trust") whereby the Trump Group would buy all of the shares transferred to the Sagi Trust by TPR in the 2004 Transfers. Having made a bargain with both the wrongful transferor, TPR, and the transferee, the Sagi Trust, the Trump Group viewed itself as having covered all its bases in addressing Genger's violation of the Stockholders Agreement. With the shares wrongfully transferred to the Sagi Trust by TPR, the Trump Group held a majority of Trans-Resources' stock.

The Trump Group then purported to reconstitute the Trans-Resources board of directors and, when Genger challenged the reconstitution, filed this action pursuant to 8 *Del. C.* § 225 to determine who controlled the board. Making that determination largely turns upon interpreting how the Stockholders Agreement applies to both parties' often excessively sharp conduct. As explained fully below, I conclude that the Trump Group controls the Trans-Resources board for the following reasons: (1) the Trump Group never received notice of the 2004 Transfers, which were made in violation of the Stockholders Agreement, until June 2008; and (2) the Trump Group did not ratify those Transfers when it bought the transferred shares from Sagi Genger and TPR. Because it never ratified the wrongful transaction, the Trump Group was free to deal with the relevant transferor, TPR, and its transferee, the Sagi Trust, and settle the matter by acquiring the wrongly transferred shares in an agreed upon negotiation. In doing so, the Trump Group clearly reserved its position that TPR made a void transfer, has proven that its position

was correct, and is entitled, as a result, to be deemed to have taken the shares from TPR as a settlement of the improper Transfers. In the alternative, even if the Trump Group ratified the 2004 Transfers — which it did not — I find that the Trump Group did not purchase the shares from Sagi Genger subject to the proxy in favor of Arie Genger. Therefore, the Trump Group holds a majority equity and voting stake in Trans-Resources, and its ability to vote its shares is unaffected by the proxy.

II. Factual Background

The following are the facts as I find them after trial.

A. The Trump Group Saves Genger's Company, Trans-Resources, From Bankruptcy In 2001

In 1985, Genger formed Trans-Resources, a Delaware corporation that eventually became the parent of three specialty fertilizer and industrial chemical companies.¹ As mentioned before, Genger's majority stake in Trans-Resources was held through TPR, another Delaware corporation. By 2001, Trans-Resources was nearly insolvent as its subsidiaries struggled in the marketplace due to a strong euro, vigorous competition from South American rivals, and miscalculations in a recent decision to expand a key plant.² At that time, Trans-Resources' bonds had a notional value of \$230 million, but their market value had plummeted.³

Because negotiations with the fractious group of investors that had invested in Trans-Resources' bonds were proving futile, Genger was delighted when Jules Trump

¹ Tr. 830 (A. Genger); Stipulated Pretrial Order at 3.

² Tr. 837-38 (A. Genger).

³ *Id.* at 12 (J. Trump).

approached him with an offer to buy Trans-Resources' bonds.⁴ Genger and Jules Trump, who both had residences on Williams Island in Miami, Florida, had been friends since at least the late 1990s.⁵ From that time until very near the commencement of this litigation, Genger and Jules Trump's families regularly socialized, dined, and vacationed together.⁶

Eventually, two entities controlled by Jules and Eddie Trump, plaintiff TR Investors, LLC ("TR Investors") and plaintiff Glenclova Investment Co. ("Glenclova"), bought all but \$100,000 of Trans-Resources' debt.⁷ Shortly after buying Trans-Resources' bonds, TR Investors and Glenclova converted their debt into equity.⁸ Under an exchange agreement, TR Investors and Glenclova collectively received 2,676.4428 Trans-Resources shares, which amounted to a substantial stake equal to 47.15% of Trans-Resources' equity.⁹

B. Genger And The Trump Group Execute A Stockholders Agreement That Requires Notice To Be Given If Genger Transfers His Shares In Trans-Resources

Jules Trump's offer came with strings. In exchange for bailing out Trans-Resources and agreeing to take a minority interest in Trans-Resources, Trump insisted on the Stockholders Agreement that gave the Trump Group strong representation and veto rights.¹⁰ Importantly in light of the present dispute, the Stockholders Agreement

⁴ *Id.* at 938 (A. Genger).

⁵ J. Trump Dep. 27, 88; A. Genger Dep. 62-63.

⁶ J. Trump Dep. 27-28; E. Trump Dep. 32; *see also* A. Genger Dep. 156-57 (indicating that Genger and Jules Trump also took regular strolls together around the walking path on Williams Island).

⁷ Tr. 117 (J. Trump), 837 (A. Genger).

⁸ *Id.* at 119 (J. Trump).

⁹ JX-100 (Exchange Agreement (March 30, 2001)).

¹⁰ Tr. 843 (A. Genger) ("[P]art of the deal was to reconstitute the board and to enable Trump family — to enable the Trump family to be on the board, to have — we created a balance of —

provided restrictions on, and in some instances prohibitions against, the transfer of stock.¹¹

In particular, Section 2.1 of the Stockholders Agreement prevented a party from transferring or pledging Trans-Resources stock to any party other than a party expressly permitted to receive such a transfer (a "Permitted Transferee"). Section 2.1 provides in relevant part:

From and after the date hereof, no Stockholder shall directly or indirectly, offer, *transfer*, sell, assign, *pledge*, encumber, hypothecate or otherwise dispose of any Shares (including any derivative transaction) (a) until after December 21, 2003, and, thereafter, only as provided in Articles 3, 4, and 5 of this Agreement, or (b) after *written notice* to the Company and the other Stockholders . . . to (i) in the case of either of the Initial Non-TPR Stockholders or their respective Permitted Transferees (A) to [certain Permitted Transferees], or (ii) in the case of TPR or a Permitted Transferee thereof, to (w) Arie Genger, (x) any entity or entities in which TPR or Arie Genger directly owns a majority of the equity interest and directly controls a majority of the voting power . . . (y) the estate o[f] Arie Genger or (z) any immediate family members or lineal descendants of Arie Genger, or trusts of which they are the sole beneficiaries-in-interest, who receive such Shares in consequence of the death of Arie Genger, which transferee(s) become a party to this Agreement. . . .¹²

That is, Permitted Transferees were: (1) in the case of transfers from any of the Trump Group entities, any entity in which either TR Investors or Glenclova had at least a 20% economic interest and a least a 30% voting interest; and (2) in the case of transfers from TPR, any of the following: (i) Arie Genger himself; (ii) any entity in which TPR or Genger directly owned a majority of the equity interest and a majority of the voting

so that I cannot do anything which is not unanimous. There were all kinds of provisions on that.").

¹¹ JX-101 (Stockholders Agreement (2001)) (the "Stockholders Agreement") §§ 2.1, 2.4, 3.1, 3.2, 3.3).

¹² *Id.* § 2.1 (emphasis added).

power at the time of the transfer, and Genger agreed to continue to maintain such ownership at all times thereafter; (iii) the estate of Arie Genger; or (iv) any of Genger's immediate family members or lineal descendants, or trusts of which they are the sole beneficiaries-in-interest, who receive the transfer of shares as a result of Genger's death.¹³ If a party to the Stockholders Agreement intended to make a transfer to a non-Permitted Transferee, then the other party had a right of first refusal, under Section 3.1, which provides in relevant part:

[I]f a Stockholder (the "Selling Stockholder") shall desire to sell, assign or transfer any Shares held by it to any person other than a Permitted Transferee (the "Offered Shares") and shall be in receipt of a bona fide written offer to purchase the Offered Shares (the "Offer"), [t]he Selling Stockholders shall give the Company and to each Covered Stockholder who is not the Selling Stockholder (the "Non-Selling Stockholders") written notice containing the terms and conditions of the Offer . . . provided that for purposes of this Section 3.1, if the Selling Stockholder is (x) a TPR Stockholder, then only the Non-TPR Stockholders shall be deemed to be Non-Selling Stockholders; and (y) a Non-TPR Stockholder, then only the TPR Stockholders shall be deemed to be Non-Selling Stockholders. . . .

Until 30 days after receipt of such notice, the Non-Selling Stockholders shall have the right to elect to purchase all of the Offered Shares at the price offered by the prospective purchaser and specified in such notice.¹⁴

The purpose of expressly limiting transfers to an enumerated list of Permitted Transferees was to ensure that the Trump Group would be dealing only with Genger, or one of the entities he controlled, in the future, and not with anyone else.¹⁵ Jules Trump was particularly concerned about limiting the Trump Group's exposure to the acrimony

¹³ *Id.*

¹⁴ *Id.* § 3.1.

¹⁵ Tr. 121 (J. Trump), 842-44, 854, 891-92 (A. Genger).

plaguing Genger's family,¹⁶ but, after much pressure from Genger, reluctantly acceded to including Genger's family members as Permitted Transferees *only* as an estate planning consequence in the event of Genger's death.¹⁷

If a transfer was made in violation of Section 2.1, then the Stockholders Agreement provided two remedies. First, Section 2.4 provided that "[a]ny attempt by a Stockholder to transfer Shares in violation of this Agreement shall be void and the Company agrees that it will not effect such a transfer or treat any alleged transferee as the holder of such Shares."¹⁸ Second, Section 3.2(a) of the Stockholders Agreement gave the Trump Group the right to purchase TPR's shares in Trans-Resources if Genger: (1) transferred shares to a non-Permitted Transferee; or (2) effected a change of control in TPR. Section 3.2(a) provides in relevant part:

The Covered Stockholders other than the hereinafter defined Terminating Stockholder (the "Purchasing Stockholders") shall have the right to elect to purchase the Shares held by a Stockholder (the "Terminating Stockholder" . . .) at the Agreement Price (as defined in Section 3.4) and on the Agreement Terms upon the occurrence of any of the following events for a period ending on the later of 60 days after determination of the Agreement Price for the Terminating Shares and 90 days after the Company and the Purchasing Stockholders receive notice from any source of the occurrence of any of the following events (each Stockholder agreeing to give the others and the Company notice of any such event promptly after its knowledge of the occurrence thereof)

(iv) the Terminating Stockholder sells, *pledges*, encumbers, hypothecates or *otherwise transfers* any interest in (including any derivative transaction), or

¹⁶ *Id.* at 121 (J. Trump) ("I had confidence in Arie and we were willing to go forward with him. But I was not willing to go forward with a bunch of people who would be fighting with each other and ultimately end up greenmailing each other."); *see also id.* at 805-06 (O. Genger) (acknowledging the "nightmar[ish]" relations in the Genger family).

¹⁷ *Id.* at 252 (Hirsch).

¹⁸ Stockholders Agreement § 2.4.

*purports to sell, pledge, encumber, hypothecate or otherwise transfer any interest in (including any derivative transaction), any of its Shares, except as permitted by and in full compliance with the terms of this Agreement. . . .*¹⁹

Therefore, Section 3.2(a) gave the Trump Group 90 days to elect to purchase TPR's shares after it "receive[d] notice from any source" that a transfer had been made to a non-Permitted Transferee, or that a change of control had occurred.²⁰

Section 6.5 outlined the form of notice required under the various provisions of the Stockholders Agreement:

All notices required to be delivered pursuant to this Agreement shall be delivered in person or by telegraphic or other facsimile transmission or sent by certified mail, return receipt requested, and shall be addressed to the Company at its principal business office, to the attention of its Chief Executive Officer, to a Non-TPR Stockholder, to the Representatives, and any other Stockholders at the address of the Stockholder shown in the Company's stock ledger or to such other address as such other Stockholder may indicate by duly giving written notice to the Company.²¹

Thus, formal notice of an event such as a share transfer was to be given directly to the Trump Group entities, *i.e.* TR Investors and Glenclova, who were parties to the Agreement, and not to Jules Trump personally.²² The Stockholders Agreement also contained a non-waiver clause, which provided that "[n]o waiver or failure on the part of a Company or a Stockholder in the exercise of any right, power or remedy shall operate as a waiver thereof, nor shall any single or particular exercise by them of any right, power

¹⁹ *Id.* § 3.2(a) (emphasis added).

²⁰ *Id.*

²¹ *Id.* § 6.5.

²² As to TR Investors, it appears that notice was to be given through Mark Hirsch at TR Investors' official address, and as to Glenclova, notice was to be given through Robert Smith at Glenclova's official address. *See id.* at 40. Jules Trump was not an officer or director of either TR Investors or Glenclova. Tr. 117 (J. Trump).

or remedy preclude other or further exercise thereof, or the exercise of any other right, power or remedy.”²³

Finally, under Section 1.6 of the Stockholders Agreement, TR Investors and Glenclova were entitled to an addition 1.85% of TPR’s shares in Trans-Resources (the “Balance Shares”).²⁴ The Balance Shares refer to shares that Bank Hapoalim had the option to purchase, the exercise of which would reduce TPR’s shareholding by 1.85%. Because of that option, the Trump Group allowed TPR to hold 52.85% of Trans-Resources’ stock, even though the parties agreed to a 51%/49% split, on the condition that the Balance Shares would revert to TR Investors and Glenclova if the Bank’s option should expire unexercised.²⁵

C. In 2004, As Part Of The Settlement Of His Acrimonious Divorce, Genger Transfers Trans-Resources Stock From TPR To The Sagi Trust, The Orly Trust, And To Himself

On October 26, 2004, after a drawn-out and contentious divorce proceeding, Genger entered into a final marital settlement agreement with his then-wife, Dalia Genger. Under that settlement agreement, Genger transferred his equity interest in TPR to Dalia Genger on October 29, 2004. On that same day, the Trans-Resources shares that TPR previously held were transferred as follows: approximately 13.9% of the shares were transferred to Genger himself, and separate trusts established for his two children, Orly and Sagi Genger (respectively, the “Orly Trust” and the “Sagi Trust”), were each transferred approximately 19.5% of the shares (collectively, the aforementioned “2004

²³ Stockholders Agreement § 6.8.

²⁴ *Id.* § 1.6.

²⁵ *Id.*; see also Tr. 255-57 (Hirsh).

Transfers”). According to the transfer agreements, the trustees of each Trust agreed to irrevocable lifetime proxies in favor of Genger (the “Proxies”).²⁶

At the time the 2004 Transfers were made, Genger did not notify TR Investors or Glenclova of the Transfers as required by the Stockholders Agreement. Genger admits that he never gave the written notice required by the Stockholders Agreement, provided the Trump Group with copies of the Proxies, or passed on a copy of the marital settlement agreement.²⁷ Nevertheless, Genger argues that TR Investors and Glenclova received notice because he orally told Jules Trump about the 2004 Transfers. In particular, Genger testified that he told Jules Trump about the 2004 Transfers “many times” from the “inception, [when] the idea germinated of how to resolve my divorce, to the execution [of the 2004 Transfers].”²⁸ Genger testified that he told Jules Trump of the 2004 Transfers during their regular strolls on Williams Island.²⁹

For his part, however, Jules Trump categorically denied that Genger ever mentioned the 2004 Transfers.³⁰ The only other person who testified to hearing any conversations between Genger and Jules Trump relating to the 2004 Transfers was Genger’s daughter, Orly. At trial, Orly Genger testified that her father “shared . . . everything” with the Trumps,³¹ and that she was present during at least one discussion between Genger and Jules Trump about the 2004 Transfers. In particular, she testified

²⁶ JX-113 (Letter Agreement and Proxy (Oct. 29, 2004)) (the “Proxy”).

²⁷ Pretrial Stipulation and Order 4; Tr. 936, 940 (A. Genger), 99 (J. Trump), 628 (Dowd).

²⁸ Tr. 856 (A. Genger).

²⁹ *Id.*

³⁰ *Id.* at 159 (J. Trump) (“Q. From the time that you became — TR Investors became a stockholder in 2001 to June 13th, 2008, did anyone give you any notice of the 2004 transfers, or the change in control of TPR? Trump. Never. Never, ever.”).

³¹ *Id.* at 783 (O. Genger).

about a discussion in “late ‘04 or early ‘05” at Jules Trump’s residence on Williams

Island.³² But, Orly Genger’s testimony regarding that conversation was vague, at best:

They talked about how TPR and [Trans-Resources] were split, how my — my dad spoke about how he split those two, how he hoped that now that my brother, since was sort of — it was now me, my mother, and my brother, and my brother was supposedly the financial guy supposed to take care of us in a sense, he was hoping that — that he would.³³

When asked for further details, she only elaborated as follows:

Q. And were there details? Was your father providing details to Mr. Trump —

O. Genger. Yeah.

Q. — in those discussions?

O. Genger. The fact that my brother was in the middle of it, you know, and just the awful nature of it. Everything was told to Jules.³⁴

On cross-examination, Orly Genger clarified that the discussion between her father and Jules Trump some time in late 2004 or early 2005 definitely took place *after* the 2004 Transfers occurred,³⁵ and that she did not remember her father specifically discussing the transfer of Trans-Resources shares to the Sagi Trust.³⁶ But she did not provide further

³² *Id.* at 787. Orly Genger also briefly mentioned a conversation between Genger and Jules Trump sometime during 2007, when her brother brought a lawsuit against her father. *Id.* at 799. But the only details she provided regarding that discussion was that she remembered “them speaking specifically about th[e] lawsuit and how incredible it was that my father had given my brother TPR [Investment], [and] he was actually against him now.” *Id.*

³³ *Id.* at 786.

³⁴ *Id.* at 789.

³⁵ *Id.* at 801 (“Q. And I want to make sure I understand. [The conversation between Genger and Jules Trump] — it definitely occurred after the 2004 transfers had occurred; is that right? O. Genger. Yes.”).

³⁶ The precise colloquy was as follows:

Q. Now, in this conversation the issue that you recall being discussed was the transfer of control of TPR [Investment] to your brother. He would be in charge.

details about the substance of the discussion between her father and Jules Trump other than to say that the “essence” of the discussion was “that [Sagi] was now sort of in charge.”³⁷ The lack of specific details in her testimony undermines her credibility because of her personal interest in the outcome of this case and her obvious desire to protect her father in his feud with her brother,³⁸ and because Genger himself testified that no one else was present during his alleged conversations with Jules Trump, even his daughter Orly.³⁹

O. Genger. That was the essence, that he was now sort of in charge.

Q. That was the essence of it.

O. Genger. Right.

Q. Yeah. And the question of the transfer of TPR’s shares of [Trans-Resources] to your trust and your brother’s trust and your father, you don’t recall that that was discussed during this conversation?

O. Genger. I’m sorry. Can you say it again?

Q. Yes. The question of the transfer by TPR [Investment] of its [Trans-Resources] shares —

O. Genger. Right.

Q. — to your trust, your brother’s trust, and your father, that was not discussed in this conversation?

O. Genger. Not that I remember.

Id. at 803-04.

³⁷ *Id.*

³⁸ *Id.* at 813 (“Q. You stand to benefit if your father prevails in this litigation? O. Genger: I hope. Yeah, I think.”).

³⁹ *Id.* at 895 (A. Genger) (“The Court: It was just the two of you? Genger: Just the two of us. The Court: Not your daughter? Genger: Not my daughter.”).

Besides his own testimony and the testimony of his daughter, the only other evidence to which Genger points as proof that he told the Trumps about the 2004 Transfers are two after-the-fact events. First, Genger points to a written consent that Trans-Resources' shareholders were required to sign in 2005 (the "2005 Written Consent") in order to resolve a dispute with Bank Hapoalim, with whom Trans-Resources had a long-term relationship, over Trans-Resources' outstanding debt. The signature page of the 2005 Written Consent included signature blocks for not only Arie Genger, but also the Orly Trust and the Sagi Trust, and identified Arie Genger as the proxy for the two Trusts.⁴⁰ That is, by including signature lines for the Orly Trust and the Sagi Trust as shareholders, the 2005 Written Consent disclosed that some sort of transfer had taken place. For their part, the Trumps credibly claim that they did not notice the additional signature lines in the 2005 Written Consent when they signed the page.⁴¹

Second, Genger claims that he mentioned the 2004 Transfers during a Trans-Resources board meeting in November 2007 at which Jules Trump was present (the "November 2007 Board Meeting").⁴² For support, Genger points to the minutes of that meeting, which reflect that "Mr. Genger advised the directors that both he and Mr. Dowd had been sued by TPR Investment Associates, Inc. and other related entities with respect to their activities as officers and/or directors of TPR Investment Associates, Inc., *the former parent Company of [Trans-Resources]*."⁴³ Genger avers that this passing

⁴⁰ JX-125 (executed written consent (July 26, 2005)) (the "2005 Written Consent").

⁴¹ Tr. 101-05 (J. Trump), 185-92 (Hirsch)

⁴² JX-149 (Trans-Resources board meeting minutes (Nov. 19, 2007)).

⁴³ *Id.*

reference to TPR being the former parent of Trans-Resources should have tipped Trump off that the 2004 Transfers were made. As we will see, that argument is undercut, however, by the reality that Genger's loyal subordinate, Bill Dowd, appears to have manipulated the corporate minutes on other occasions to suit Genger's interests.

D. Genger Finally Tells The Trumps About The 2004 Transfers During Negotiations To Restructure Trans-Resources' Debt

In the spring of 2008, Trans-Resources was once again having financial troubles, now in a dispute with Bank Hapoalim, which was pressuring Trans-Resources to sell its main subsidiary, Haifa Chemical, Inc., in order to avoid foreclosure.⁴⁴ Genger turned to the Trumps for help, asking Jules Trump if the Trump Group would provide the capital necessary to retire Trans-Resources' bank debt in exchange for an increased equity position that would give the Trump Group control of Trans-Resources.⁴⁵ Genger relied on Jules Trump in particular not only because of their past relationship but also because Bank Hapoalim, which had indicated that it had lost confidence in Genger, was however willing to negotiate with Trump in regard to Trans-Resources' debt.⁴⁶ On May 31, 2008, Genger and Jules Trump met to discuss the general contours of an agreement (the "Funding Agreement"), which would provide for a capital infusion into Trans-Resources.⁴⁷ After that meeting, Trump negotiated with Bank Hapoalim to reduce Trans-

⁴⁴ Tr. 38-39 (J. Trump).

⁴⁵ *Id.* at 41-42 (J. Trump).

⁴⁶ *Id.* at 124-27, 146 (J. Trump).

⁴⁷ *Id.* at 872 (A. Genger); 43-44, 135-36 (J. Trump).

Resources' debt load, and asked Genger to meet with Eddie Trump and Mark Hirsch, the Trumps' lawyer, in New York to work out the details of the Funding Agreement.⁴⁸

1. Genger, Eddie Trump, And Mark Hirsch Meet On June 13, 2008

Genger met with Eddie Trump and Hirsch in New York on June 13, 2008 (the "June 13 Meeting"). Early in the June 13 Meeting, Hirsch gave Genger a draft of the Funding Agreement. That draft listed TPR, Glenclova, and TR Investors as the company's sole shareholders, thereby strongly suggesting that the Trump Group was unaware at that time of the 2004 Transfers.⁴⁹ Upon reviewing the draft, Genger commented that TPR was no longer a Trans-Resources stockholder.⁵⁰ Both Eddie Trump and Hirsch expressed shock upon hearing that, and Hirsch reminded Genger that he was not permitted to transfer his stake in Trans-Resources without first providing notice and a right of first refusal to the Trump Group.⁵¹

Upon seeing their surprise, Genger did not stop and say what one would expect to be the first thing out of his mouth if Genger had already given repeated notice to Jules

⁴⁸ *Id.* at 868-69 (A. Genger).

⁴⁹ JX-170 (email from Mark Hirsch to Jules Trump with draft agreements attached (June 12, 2008)).

⁵⁰ Tr. 283 (Hirsch), 498-99 (E. Trump).

⁵¹ *Id.* at 284-85 (Hirsch), 499 (E. Trump). Interestingly, the trial record includes an email from Hirsch to Jules Trump, dated June 11, 2008, in which Hirsch describes the transfer restrictions and the right of first refusal provisions in the Stockholders Agreement. JX-167 (email from Mark Hirsch to Jules Trump (June 11, 2008)). The timing of that email suggests that the Trumps might have known about the 2004 Transfers before the June 13, 2008 meeting. But I do not find this email to be proof that Genger had given the Trumps oral notice because: (1) the Trumps may have simply suspected on their own that something like the 2004 Transfers had taken place; or (2) the Trumps may have heard rumors from sources other than Genger that the 2004 Transfers had occurred. In either event, notice as required under Stockholders Agreement had not been given. Furthermore, even if the email did indicate that notice had been given, it still suggests that the timing of that notice was no earlier than June 2008.

Trump: "Why are you acting so surprised? I told Jules all about these Transfers years ago."⁵² Rather, Genger acknowledged that he had not provided notice of the 2004 Transfers, but insisted that he had lived within the spirit of the Stockholders Agreement by maintaining control of the stock through the Proxies.⁵³ And, Genger spent the better part of that day explaining the 2004 Transfers to Eddie Trump and Hirsch,⁵⁴ which would have been unnecessary had they already known about the Transfers.

Finally, at the end of the meeting, Genger offered to arrange a meeting with his lawyer, David Lentz, who was most familiar with the details of the 2004 Transfers.⁵⁵ Eddie Trump and Hirsch met with Lentz three days later, on June 16, 2008, to discuss the details of the 2004 Transfers. It is also noteworthy that, before that meeting, Genger never told Lentz that he had given Jules Trump oral notice of the 2004 Transfers.⁵⁶ If notice of the 2004 Transfers had indeed been given, one would have expected Arie Genger to have at least mentioned that important detail to his own counsel. During that

⁵² Tr. 501 (E. Trump) ("At any time during the meeting did Mr. Genger say, 'Well, I told your brother, Jules. Let's get him on the phone,' or words to that effect? E. Trump: No."). Genger's testimony on this important issue was vague at best. He only recalled telling Eddie Trump and Hirsch something to the effect of "Jules knows about it" at some point during the June 13 Meeting. *Id.* at 900 (A. Genger). But, Genger could give no further details, and he admitted that he never pressed the point or suggested that they get Jules Trump on the phone to clarify the issue. *Id.*

⁵³ *Id.* at 284 (Hirsch) ("I took out the agreement to show [Genger] specifically why he could not have transferred the shares, that this was not permitted under the agreement. And he said, 'All right. You know, so I didn't tell you about it, but I didn't think I had to. I mean, what's changed? I still - I still vote the shares.'").

⁵⁴ *Id.* at 893-94, 899 (A. Genger).

⁵⁵ *Id.* at 902-03 (A. Genger).

⁵⁶ *Id.* at 7 (Lentz) ("Q: And Mr. Genger didn't tell you [before the June 16th meeting] that he claimed to have given some sort of notice to Jules Trump. That's correct; right? . . . Lentz: I believe your statement is correct.").

meeting, Lentz never suggested that Jules Trump had already known about the 2004 Transfers because Genger had told him about them years ago.⁵⁷

2. Later Communications Between Genger, William Dowd, And David Lentz Admit That Genger Never Gave The Trump Group Notice Of The 2004 Transfers

In a series of emails and memoranda produced over the two weeks following the June 16 meeting, Lentz repeatedly acknowledged Genger's failure to provide any notice of the 2004 Transfers. In a June 17, 2008 email, Lentz wrote that "[t]he Trumps *never consented to* and don't want [the Sagi] Trust or [Orly] Trust . . . as minority partners (shareholders) in [Trans-Resources]."⁵⁸ And, in a June 26, 2008 email, Lentz wrote that "no notice was given" to the Trumps about the 2004 Transfers.⁵⁹ But, Lentz's most telling admission came in a memorandum he wrote for Genger analyzing the parties' various bargaining positions and how likely machinations by Sagi Genger would affect the outcome of the dispute (the "Lentz Memo"). In that Memo, Lentz wrote:

While it is true the Trumps never got notice, the entire intent of the Shareholder's agreement has been carried out anyway. In other words, why did AG not give them actual notice? Because, AG will testify, using the TPR shell was never the intention of the Trumps and AG — the real intention was to keep the ownership of [Trans-Resources] in the Genger family under the voting and operational control of AG and the Stipulation did just that. So, AG becomes SG's best witness. AG will not say I just forgot to tell the Trumps. He will not say I tried to get away with something and thought the Trumps would not find out. He will testify that

⁵⁷ *Id.* at 990 (Lentz) ("Q. Nobody said at the meeting, then, that any notice had been given in substance; right? Lentz. Correct."); *see also id.* at 994 (Lentz) ("Q. [Y]ou went through an entire meeting about the absence of notice and people asking what, in fact, occurred. And no one from your side of the discussion spoke a peep refuting that contention; right? Lentz: Nobody refuted it, that's correct.").

⁵⁸ JX-331 (email from David Lentz to Arie Genger, Bill Dowd, and Christopher Gengaro (June 17, 2008)) (emphasis added).

⁵⁹ JX-337 (email from David Lentz to Arie Genger, Bill Dowd, and Christopher Gengaro (June 26, 2008)).

whether the corporate form of TPR or the kids' trusts w[as] used made no difference. The essence of these protections was to make sure the Genger family owned roughly 50% and that AG could vote all of those shares. That's what happened. So, *while there was a technical violation*, the Trumps got what they bargained for.⁶⁰

Later in that same Memo, Lentz added: "AG does not have clean hands because like SG, *AG never told the Trumps*."⁶¹ Thus, Genger's own attorney repeatedly acknowledged that Genger had never given the Trumps *any* type of notice.

3. At The June 25, 2008 Meeting Of Trans-Resources' Board And Stockholders, Genger Himself Indicates That Notice Of The 2004 Transfers Was Not Given To The Trumps

The Trans-Resources board met on June 25, 2008 (the "June 25 Board Meeting") and unanimously approved the Funding Agreement, which provided that the Trumps would invest an additional \$57.5 million in the company in exchange for 50% of Trans-Resources' outstanding stock, which would give the Trumps clear voting control and by far the largest equity position in the company.⁶² That is, the totality of the Funding Agreement would address the injury to the Trump Group from the 2004 Transfers by giving it voting control of Trans-Resources. Handwritten notes by Bill Dowd, a director and Trans-Resources' chief executive officer, recorded that "AG describe[d] [Trans-Resources] stock transfer *in violation of agreement*" during the meeting.⁶³ That is, Genger acknowledged that the 2004 Transfers were made without providing notice to the

⁶⁰ JX-332 (memorandum from David Lentz to Arie Genger, Bill Dowd, and Chris Gengaro) (the "Lentz Memo") (emphasis added).

⁶¹ *Id.* (emphasis added).

⁶² JX-181 (minutes of joint meeting of the board of directors and stockholders of Trans-Resources, Inc. (June 25, 2008)).

⁶³ JX-179 (handwritten notes of Bill Dowd (June 25, 2008)) (emphasis added).

Trumps. Tellingly, Dowd, who had worked for Genger for years, omitted that important admission from the formal minutes he drafted following the meeting.⁶⁴

E. Negotiations To Restructure Trans-Resources Break Down, And The Parties Eventually Commence This Litigation

Although the Funding Agreement solved the problem with Bank Hapoalim, Genger and the Trumps still had to sort out how to ensure that the Trumps were given control of the Trans-Resources board as required under the Funding Agreement. That was a problem because Genger and the Trumps anticipated that Sagi Genger, who now had a claim to be a Trans-Resources stockholder on account of the 2004 Transfers, would litigate any attempt to transfer control from Genger to the Trumps, if for no other reason than to spite his father.⁶⁵ During June and July of 2008, Genger and the Trumps discussed options for dealing with Sagi Genger. One of the options the Trumps suggested was confronting Sagi Genger with the argument that the 2004 Transfers violated the Stockholders Agreement, and that he was therefore not a beneficial owner of the Shares.⁶⁶ Importantly, Genger resisted this approach, likely because that would expose him to liability for representing falsely in the divorce settlement that the 2004 Transfers were not made in violation of any agreement.⁶⁷

⁶⁴ See JX-179 (draft meeting minutes (June 25, 2008)) (omitting any reference to the 2004 Transfers being made in violation of the Stockholders Agreement).

⁶⁵ Tr. 318-19 (Hirsch).

⁶⁶ *Id.*

⁶⁷ *Id.* at 304 (Hirsch).

1. Genger Reneges On The Funding Agreement, And The Trumps Respond With A Lawsuit

Genger and the Trumps never reached common ground on how to approach Sagi, because Genger began to back-track on the draft terms of the Funding Agreement. Genger could afford to back out of the Funding Agreement because he had devised a way — albeit one of questionable propriety — to upstream funds from the Haifa Chemical, Inc. subsidiary to Trans-Resources, thus allowing Trans-Resources to fulfill its obligations to Bank Hapoalim, which Jules Trump had successfully reduced during his negotiations with the bank on behalf of Trans-Resources.⁶⁸ Because Genger had secured an alternative source of capital, the Funding Agreement with the Trumps was no longer the only mechanism for rescuing Trans-Resources. From that position of increased leverage, Genger began to disengage from the Funding Agreement deal. First, despite the fact that Bank Hapoalim required payment by late August, Genger requested that execution of the Funding Agreement be postponed upon the advice of counsel. Wielding a problem of his own creation, Genger asserted that Trans-Resources' Delaware lawyers had advised him that Trans-Resources needed to establish an independent committee to review the fairness of the Funding Agreement because the recipients of the 2004 Transfers might complain. Second, at an August 1, 2008 meeting, Genger's lawyers claimed, for the first time, that Genger had given Jules Trump oral notice of the 2004

⁶⁸ Dowd Dep. 281.

Transfers years ago, and threatened litigation if the Trumps chose to challenge the 2004 Transfers.⁶⁹

The Trumps responded on August 8, 2008 with a letter to TPR and Trans-Resources indicating that Glenclova was exercising its right under Section 3.2 of the Stockholders Agreement to purchase all of the shares subject to the 2004 Transfers, and requesting that the Trans-Resources board begin the process of establishing their purchase price.⁷⁰ On August 11, 2008, Glenclova filed a suit in the United States District Court for the Southern District of New York seeking to enforce the Funding Agreement and its rights under the Stockholders Agreement.⁷¹ On August 13, 2008, Genger responded through a letter from his attorneys, claiming that Glenclova had no right to purchase the shares because he had kept Jules Trump fully informed of the 2004 Transfers at the time they were made four years prior.⁷²

2. The Trump Group Purchases The Sagi Trust's Shares And Reconstitutes Trans-Resources' Board Of Directors, Leading To This Section 225 Action

The lawsuit in federal court in New York was not the only course of action the Trumps took. On August 21, 2008, Jules Trump contacted Sagi Genger to explore the possibility of acquiring the 1,102.8 shares purportedly transferred to the Sagi Trust in 2004 (the "Sagi Shares").⁷³ And, on August 22, 2008, the Trumps purchased the Sagi Shares pursuant to a stock purchase agreement (the "Purchase Agreement") between the

⁶⁹ Tr. 65, 155-56 (J. Trump), 364 (Hirsch).

⁷⁰ JX-198 (letter from Glenclova to TPR and Trans-Resources (Aug. 8, 2008)).

⁷¹ JX-204 (Complaint, *New TR Equity, LLC v. Trans-Resources, Inc.* (S.D.N.Y. Aug. 11, 2008)).

⁷² JX-350 (letter from Charles Weissman to Barry Adelman (Aug. 13, 2008)).

⁷³ Tr. 111 (J. Trump).

Sagi Trust, TPR, and the Trumps' entities, TR Investors, Glenclova, New TR Equity I, LLC ("Equity I"), and New TR Equity II, LLC ("Equity II").⁷⁴ Importantly, the transaction included not only the Sagi Trust as a party but also the wrongful transferor, TPR. Sagi Genger could act for TPR because, after making the 2004 Transfers, Genger had ceded control of TPR to Dalia Genger, who subsequently sold her interest in TPR to her son, Sagi.⁷⁵ The Purchase Agreement contained a specific section addressing the reality that the Trump Group viewed the 2004 Transfers as void and that TPR still owned them and was obliged to sell them to the Trump Group at 2004 values. To wit, the Purchase Agreement provided that it would be considered consummated between the Trump Group and TPR if the 2004 Transfers were to be found void:

If at any time following the Closing Date, it is determined that Seller is not the record and beneficial owner of the Shares as of the date hereof, by virtue of the transfer of the Shares to it by TPR being deemed to have been void or for any other reason, and that all right, title and interest in and to the Shares is held by TPR, subject only to the plaintiff's asserted rights under the Stockholders Agreement asserted in the action styled Glenclova Investment Co. v. Trans-Resources, Inc. and TPR Investment Associates, Inc., Case No. 08-CIV-7140 (JFK), pending the United States District Court for the Southern District of New York, the parties hereby agree that (a) *this Agreement and the transactions contemplated hereby shall be deemed to have been entered into and consummated with TPR*, (b) *the Purchasers shall retain all right, title and interest in and to the Shares as if purchased from TPR pursuant to this Agreement*, (c) *TPR shall look only to Seller for any payments made by the Purchasers pursuant to this Agreement*, (d) *the Purchasers shall have no liability or obligation to TPR in respect of the Shares*, and (e) *all representations, warranties, covenants and agreements made by Seller herein, shall be deemed to have been made by TPR as of the date hereof*.⁷⁶

⁷⁴ JX-225 (the "Purchase Agreement").

⁷⁵ Tr. 547 (S. Genger).

⁷⁶ Purchase Agreement § 10 (emphasis added).

Thus, by signing an agreement with both the Sagi Trust and TPR, the wrongful transferee, the Trump Group dealt with the Genger-caused problem that Genger exploited in order to derail the Funding Agreement. By dealing directly with both the allegedly innocent transferee — the Sagi Trust — and the wrongdoer — TPR — the Trump Group covered all of its bases.

Having purchased the Sagi Shares, which gave them a majority equity position in Trans-Resources, the Trump Group then executed a written consent on August 25, 2008 that removed Genger from the Trans-Resources board, elected Eddie Trump and Hirsch to the board, and affirmed the election of Jules Trump and Robert Smith to the board. The Trump Group delivered that written consent to Trans-Resources, but Genger rejected it.⁷⁷

In response, the Trump Group filed a single-count complaint pursuant to 8 *Del. C.* § 225 in order to determine the composition of the Trans-Resources board (the “Section 225 Action”). Consistent with their position throughout the summer of 2008, the Trump Group’s central claim was that the 2004 Transfers were made in violation of the Stockholders Agreement, and that it therefore had the right to purchase all of TPR’s shares pursuant to Section 3 of the Stockholders Agreement.⁷⁸ Genger responded with a counterclaim, raising a number of arguments for why the 2004 Transfers were made appropriately — chief among them his assertions that he told Jules Trump of the Transfers at the time they were made, and that, in any event, the Trump Group’s purchase

⁷⁷ Tr. 403-06 (Hirsch).

⁷⁸ Compl. ¶ 10.

of the Sagi Shares in 2008 ratified the 2004 Transfers — and claiming that, therefore, he still controlled Trans-Resources' board. Genger also argues that the Trump Group violated Section 2.1 of the Stockholders Agreement when Equity I and Equity II pledged Trans-Resources shares in return for financing to buy the Sagi Shares.

Soon after the Section 225 Action was filed, the parties promptly settled the matter, which resulted in a stipulated final judgment that declared that the Trump Group's designees constituted a majority of the board.⁷⁹ But, like any other moment of agreement between the parties in this case on anything, that settlement was short-lived. On October 10, 2008 — two weeks after the final judgment was entered — the Trump Group moved to re-open the Section 225 Action. They moved to reopen because they alleged that, after taking control of Trans-Resources, they discovered that Genger had destroyed documents relevant to the Section 225 Action in violation of a status quo order.

The issue of whether Genger should be held in contempt for destroying documents in violation of this court's status quo order was decided in 2009 in a separate trial.⁸⁰ It is unnecessary to recount here the facts or analysis involved in that trial, which are summarized in the opinion that resulted.⁸¹ What matters for present purposes is the outcome: Genger was found to be in contempt, which raises Genger's evidentiary burden on any issue on which he has the burden of proof by one level and renders his uncorroborated testimony insufficient to establish material facts.⁸²

⁷⁹ See *TR Investors, LLC v. Arie Genger*, C.A. No. 3994-VCS (Sept. 26, 2008) (ORDER).

⁸⁰ *TR Investors, LLC v. Genger*, 2009 WL 4696062 (Del. Ch. Dec. 9, 2009).

⁸¹ See *id.* at *1-15.

⁸² See *id.* at *18-19.

III. Legal Analysis

Genger has proliferated a host of theories — including new ones after trial — as to why he retains voting control over Trans-Resources, and the Trump Group has accurately described its efforts to address Genger’s ever-changing arguments as playing a game of “Whack-a-Mole.”⁸³ It is possible, nevertheless, to sift through the heaping stew pot filled with every conceivable exculpatory theory that ever crossed his lawyers’ inventive minds that Genger has cooked up and identify the chunkier ingredients. Genger’s main theory is that the 2004 Transfers were made appropriately, either because he gave the Trump Group notice or because the Trump Group ratified the Transfers. Genger’s primary alternative theory is that, even if the 2004 Transfers were not appropriate, the Trump Group took the Sagi Shares subject to the Proxy in his favor.

In the analysis that follows, I do not address all of the alternative theories Genger concocted, but rather focus on his two fundamental theories. Treating all of his secondary arguments is unnecessary because Genger has failed to bear his evidentiary burden as to those core theories on which the rest of his case depends. That is, Genger has failed to prove that he properly notified the Trump Group of the 2004 Transfers at any time before the June 13 Meeting, or that the Trump Group somehow ratified the 2004 Transfers after the fact. And, even if the Trump Group did ratify the 2004 Transfers —

⁸³ See Trump Post-Trial Ans. Br. 3. For example, Genger’s counsel spent a great deal of time at post-trial oral argument in a befuddling exposition of a theory *introduced into the case as a footnote in its post-trial answering brief*. Compare Post-Trial Tr. 128-58 with Genger Post-Trial Ans. Br. 24, n. 18.

which it did not — Genger has failed to prove that it took the Sagi Shares subject to the Proxy.

A. Standard Of Review

The standard of review I apply in analyzing the aforementioned issues is different in this case than what is typical. The party attempting to gain control of an entity in an action pursuant to 8 *Del. C.* § 225 bears the burden of proof on any issue, the outcome of which would affect the determination of the Trans-Resources' board.⁸⁴ Generally speaking, the burden of proof in civil cases is that the party with the burden must prove his position by a preponderance of the evidence.⁸⁵ But, because of this court's prior ruling in the contempt trial, Genger's burden is raised a level, meaning that he must prevail on any issue in which he bears the burden of proof by clear and convincing evidence. And, as mentioned before, Genger's own uncorroborated testimony will not be sufficient to establish any material fact.⁸⁶

B. Arie Genger Did Not Notify The Trump Group Of The 2004 Transfers Until June 13, 2008

The first issue I must address is Genger's argument that he gave the Trump Group notice of the 2004 Transfers during his conversations in late 2004 or early 2005 with Jules Trump about his divorce and that the Trump Group is chargeable with laches.⁸⁷

⁸⁴ See *Agranoff v. Miller*, 1999 WL 219650, at *12 (Del. Ch. Apr. 12, 1999), *aff'd*, 737 A.2d 530 (Del. 1999). Genger conceded that he bears the burden of proof. Contempt Trial Tr. 355.

⁸⁵ See *SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *12 (Del. Ch. June 16, 2009).

⁸⁶ See *supra* page 25.

⁸⁷ Laches operates to bar a claim where "(a) [the] plaintiff knew (or should have known) of its rights or claim; (b) [the] plaintiff failed to assert its rights or claim; and (c) [the] defendant has materially changed its position or otherwise materially relied on plaintiff's failure to assert."

This argument is central to the case because the Stockholders Agreement provides that, upon receiving notice of an improper transfer from any source, the Trump Group has 90 days to elect to purchase the shares held by the stockholder making the transfer, *i.e.*

TPR.⁸⁸ If the first time the Trumps heard about the 2004 Transfers was at the June 13 Meeting, then the Trump Group acted within the 90-day window provided in the contract because it elected to purchase TPR's shares on August 8, 2008, when it sent TPR a letter indicating that it elected to exercise its rights under Section 3.2 of the Stockholders Agreement.⁸⁹ But, if the Trumps received notice some time before May 8, 2008, then their demand to exercise their purchase rights under the Stockholders Agreement on August 8, 2008 would arguably be tardy.

Tellingly, Genger spent only one and a half pages in his post-trial briefing on this argument.⁹⁰ That is likely because he knew, as shown below, that he has failed to bear his evidentiary burden on this issue. There is no credible evidence indicating that Genger ever told Jules Trump about the 2004 Transfers in late 2004 or early 2005.

At trial, Genger offered little more than his unbelievable and uncorroborated testimony to support his claim that he notified the Trump Group. As discussed earlier, Genger testified that he told Jules Trump about the 2004 Transfers on a number of occasions in late 2004 or early 2005 while the two discussed developments in Genger's

Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 714 A.2d 96, 104 (Del. Ch. 1998); *see also Fed. United Corp. v. Havender*, 11 A.2d 331, 344 (Del. 1940) ("Sitting by inactive and in what amounts to silence, when every consideration for the rights of others demanded prompt and vigorous action, and until affairs had become so complicated that a restoration of former status was difficult, if not impossible, is conduct amounting to laches.").

⁸⁸ Stockholders Agreement § 3.2(a).

⁸⁹ JX-198 (Letter from Glenclova to Trans-Resources and TPR (Aug. 8, 2008)).

⁹⁰ *See* Genger Post-Trial Op. Br. 28-30.

divorce during their strolls on Williams Island.⁹¹ For his part, Jules Trump categorically denied that Genger ever mentioned the 2004 Transfers in late 2004 or early 2005.⁹² The only other person who testified to hearing Genger and Trump discuss the matter was Orly Genger. But her testimony gave little detail about what was actually said during those alleged conversations, and it was contradicted by Genger himself, who said that she was not present at the key conversation when he told Jules Trump about the Transfers.⁹³ Therefore, I do not find her testimony of the alleged conversations between Genger and Jules Trump credible, especially in light of her personal interest in this case.

Moreover, if Genger did in fact tell Jules Trump about the 2004 Transfers in late 2004 or early 2005, then why did he not press that point at the June 13 Meeting when Eddie Trump and Hirsch appeared shocked to hear the news? The natural thing to say in that situation would have been to make the obvious point that he had told Jules about it years ago. But, at trial, Genger only testified vaguely, haltingly, and meekly that he told them something along the lines of “Jules knows about it,” and gave no other details of what he said in that regard.⁹⁴ Genger also admitted that he never pressed the point any further, even though he became “[v]ery frustrated” with the repeated questions Eddie Trump and Hirsch were asking.⁹⁵ For example, Genger never said that they should get Jules Trump on the phone to confirm that Genger had indeed told him about the

⁹¹ See *supra* page 11.

⁹² See *supra* page 11.

⁹³ See *supra* page 11-13.

⁹⁴ Tr. 900 (A. Genger).

⁹⁵ *Id.*

Transfers.⁹⁶ Rather, Genger attempted to justify the Transfers on the grounds that he still had voting control through the Proxies.⁹⁷

Genger also failed to mention his alleged conversations with Jules Trump even when he spoke with his lawyer, David Lentz, after the June 13 Meeting.⁹⁸ Such an important detail would, if true, have been one of the first things Genger told his counsel. But, the evidence indicates Lentz believed at the time that Genger had never informed Jules Trump of the 2004 Transfers.⁹⁹ That fact is reflected most clearly in the Lentz Memo, which stated repeatedly that notice had never been provided to the Trump Group.¹⁰⁰

Thus, the overwhelming thrust of the evidence indicates that everyone in Genger's camp knew full well that he had never told the Trump Group about the 2004 Transfers before the June 13 Meeting.¹⁰¹ Indeed, Bill Dowd's notes of the June 25 Board Meeting indicate that Genger himself admitted that the Transfers were made in violation of the Stockholders Agreement.¹⁰² The inescapable conclusion is that Genger did not provide the Trump Group with any form of notice before the June 13 Meeting, choosing rather to trust in his savvy to manage the Trumps if the issue ever arose.

Nor can Genger rely on the passing references to the possibility of a transfer in the 2005 Written Consents and the minutes of the November 2007 Board Meeting. As noted,

⁹⁶ *Id.*

⁹⁷ *See supra* page 17.

⁹⁸ *See supra* page 17.

⁹⁹ *See supra* page 17-19.

¹⁰⁰ *See supra* page 18-19.

¹⁰¹ *See* Tr. 631 (Dowd), 1008 (Lentz).

¹⁰² *See supra* page 19.

the accuracy of the minutes of the November 2007 Board Meeting appears to be suspect.¹⁰³ Furthermore, the Stockholders Agreement required a specific form of notice to be given to TR Investors and Glenclova.¹⁰⁴ Even if Genger told Jules Trump about the 2004 Transfers in late 2004 or early 2005, which I conclude he did not, that would not constitute notice to TR Investors or Glenclova. But more important is the fact that passing references in the 2005 Written Notices or the minutes of the November 2007 Board Meeting do not constitute proper notice of any kind or even put the Trump Group on effective inquiry notice. Business people can miss things. The idea that the Trump Group had to review every stray reference in the board minutes or to read between the lines on the signature page of the 2005 Written Consents for signs of a possible transfer is wrong. The notice provision in the Stockholders Agreement was specific and designed to ensure that the Trump Group did not have to police the world in this way, as was the Stockholders Agreement's strong anti-waiver provision.¹⁰⁵ Finally, I am persuaded by, among other things, the draft Funding Agreement the Trump Group proposed that indicated that the Trump Group did not know of the 2004 Transfers. Notably, I conclude that the Trump Group would prevail on this issue even if they had the burden to show that they had not been given proper notice. But, because Genger admits he did not give proper notice as required under the contract,¹⁰⁶ it was his burden to show that he should nevertheless be alleviated of his obligations under the Stockholders Agreement because

¹⁰³ See *supra* pages 19-20.

¹⁰⁴ See Stockholders Agreement § 6.5.

¹⁰⁵ See *id.* at §§ 6.5, 6.8.

¹⁰⁶ See Pretrial Stipulation and Order 4.

he gave Jules Trump oral notice and, certainly, it was his burden to prove a laches defense.

C. The Trump Group Did Not Ratify The 2004 Transfers

Genger next argues that the Trump Group nevertheless ratified the 2004 Transfers. The defense of ratification is perhaps best understood by reference to its closest cousin, the doctrine of acquiescence.¹⁰⁷ Acquiescence occurs when a party “has knowledge of an improper act by another, yet stands by without objection and allows the other party to act in a manner inconsistent with the claimant’s property rights.”¹⁰⁸ Ratification differs primarily in timing: “[a]quiescence properly speaks of assent by words or conduct *during the progress* of a transaction, while ratification suggests an assent *after the fact*.”¹⁰⁹ Thus, to find that a party ratified a prior act, it is first necessary to find that the ratifying party had “[k]nowledge, actual or imputed, of all material facts.”¹¹⁰ Second, ratification requires an affirmative act by the ratifying party. Assent can be “implied from conduct,

¹⁰⁷ See *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943) (“Acquiescence and ratification are closely related.”).

¹⁰⁸ *Brandywine Dev. Group, L.L.C. v. Alpha Trust*, 2003 WL 241727, at *4 (Del. Ch. Jan. 30, 2003).

¹⁰⁹ *Frank*, 32 A.2d at 283 (emphasis added); see also 1 DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 11.03[a], at 11-20 (2009) (“Acquiescence involves assent during the progress of a transaction, while ratification suggests assent after the fact.”).

¹¹⁰ *Frank*, 32 A.2d at 283; see also *Papaioanu v. Comm’rs of Rehoboth*, 186 A.2d 745, 749-50 (Del. Ch. 1962).

as well as expressed by words” but is always a “voluntary and positive act.”¹¹¹ Accepting the benefits of a transaction can be an indication of that assent.¹¹²

1. Genger Has Not Met His Burden Of Proof As To His Ratification Claim

Realizing that he had a very weak argument that he gave effective notice of the 2004 Transfers to the Trump Group, Genger spent most of his briefing attempting to argue that the Trump Group ratified the 2004 Transfers. Because of his prior acts of spoliation, Genger bears the burden to prove ratification by clear and convincing evidence. He has not done so.

Genger argues that the Trump Group ratified the 2004 Transfers on two occasions:

(1) when it accepted shareholder approval of the Funding Agreement at the June 25

Board Meeting; and (2) when it purchased the Sagi Shares on August 22, 2008.¹¹³ As to

¹¹¹ *Frank*, 32 A.2d at 283; *see also* WOLFE & PITTENGER, § 11.03[a] at 11-19 to 11-20 (stating that ratification requires proof of a relinquishment of existing, known rights, and the “acceptance of new replacement rights or benefits”).

¹¹² *See Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 177 (Del. 1991) (stating that accepting the benefits of a transaction, even though the conduct in question is a breach of some duty owed to the shareholder, may bar the shareholder from obtaining equitable relief); *Frank*, 32 A.2d at 282 (finding that a shareholder “could not accept the benefit offered by the [transaction] and at the same time deny its validity”); *Giammalvo v. Sunshine Mining Co.*, 1994 WL 30547, at *10 (Del. Ch. Jan. 31, 1994), *aff’d*, 651 A.2d 787 (Del. 1994) (“The equitable defenses of ratification and acquiescence are closely related. Under the proper circumstances, both doctrine prevent one who accepts the benefits of a transaction from thereafter attacking it.”); *Dannley v. Murray*, 1980 WL 268061, at *4 (Del. Ch. July 3, 1980) (“The ‘affirmance’ required to create ratification . . . may arise by the retention of benefits with knowledge of the unauthorized acts.”) (citations omitted); *Trounstine v. Remington Rand*, 194 A. 95, 99 (Del. Ch. 1937) (“[E]quity will not hear a complainant stultify himself by complaining against acts in which he participated or of which he has demonstrated his approval by sharing in their benefits.”).

¹¹³ Later in the briefing process, Genger recast his argument about the 2005 Written Consents and the minutes of the November 2007 Board Meeting in ratification terms. That is, Genger argued that the 2005 Written Consents and the minutes of the November 2007 Board Meeting indicate that the Trump Group ratified the 2004 Transfers. The argument fares no better presented within a ratification analysis. As explained above, I find this argument unconvincing

the June 25 Board Meeting, Genger's theory is that the Trump Group accepted Genger's vote on behalf of the Sagi and Orly Trusts at the June 25 Board Meeting when the Trans-Resources stockholders approved the Funding Agreement. Genger argues that the Trump Group benefited when Genger purportedly voted the Proxies at the June 25 Board Meeting because approval of the Funding Agreement was a step towards giving them control of the company. As to the second theory, Genger argues that the Trump Group acknowledged the Sagi Trust as the transferee of the Sagi Shares, and benefited from purchasing the Sagi Shares because buying directly from Sagi Genger allowed the Trump Group to avoid the uncertainty and cost of enforcing their rights under Section 3.2 of the Stockholders Agreement.

Genger's ratification argument fails for two primary reasons. First, Genger's argument that the Trump Group ratified the 2004 Transfers is belied by the fact that the Trump Group repeatedly stated that the Transfers were made in violation of the Stockholders Agreement. Eddie Trump and Hirsch made that point at the June 13 Meeting.¹¹⁴ The fact that the Transfers were made in violation of the Agreement was

because, although representatives of the Trump Group received the 2005 Written Consent and signed its signature pages, and approved the minutes of the November 2007 Board Meeting, neither document involved the communication of a material amount of information about the 2004 Transfers to properly notify the Trump Group of the Transfers. Before a party can ratify something, it must first have "sufficient notice or means of knowledge" of the transaction or act in question. *Papaioanu*, 186 A.2d at 749-50. The 2005 Written Consent and the 2007 Board Minutes made, at best, an oblique suggestion that some event might have changed the shareholdings of Trans-Resources' stock. But neither the 2005 Written Consent nor the minutes of the November 2007 Board Meeting indicate any particular information about the 2004 Transfers, and neither event even occurred in a context where the Trump Group would have been alerted that something like the Transfers may have taken place. Therefore, Genger's ratification argument based on those pieces of evidence fails.

¹¹⁴ See *supra* page 16.

repeated at the June 25 Board Meeting.¹¹⁵ The letter the Trump Group sent to Trans-Resources on August 8, 2008, whereby it expressed its intention to exercise its rights to buy the 2004 Transfer shares, indicated that the 2004 Transfers were made in violation of the Stockholders Agreement.¹¹⁶ And, the Trump Group's complaint in this matter claimed that the 2004 Transfers violated the Stockholders Agreement.¹¹⁷ Thus, the clear and consistent message from the Trump Group to Genger at all relevant times was that the Stockholders Agreement had been violated. At no point did the Trump Group tell Genger that it accepted the 2004 Transfers.

Second, Genger has also failed to show that the Trump Group benefited in any way that suggests ratification. That is, Genger's argument that the Trump Group ratified the 2004 Transfers at the June 25 Board Meeting must be rejected because Genger reneged on the Funding Agreement. Because the Agreement was never executed, the Trump Group never received the benefit that was the condition upon which it might actually not challenge the 2004 Transfers. Without the Trump Group having received the benefit that was to be given for relinquishing its claim that the 2004 Transfers were void, there is no basis to conclude that the Trump Group assented to the 2004 Transfers by accepting Genger's vote on behalf of the Sagi and Orly Trust in favor of the Funding Agreement.¹¹⁸

¹¹⁵ See *supra* page 19.

¹¹⁶ See *supra* page 22.

¹¹⁷ See Compl. ¶ 8.

¹¹⁸ Genger argues that it was enough that the Trump Group "accepted for themselves as shareholders the pecuniary benefits" of the Funding Agreement, even though they never actually received those benefits because that deal was never consummated. Genger's Post-Trial Op. Br.

Indeed, the Funding Agreement proves the point. The Trump Group was willing to consider a resolution of the violation of the Stockholders Agreement that remedied that violation by giving them voting control of Trans-Resources. In so doing, they were willing to accept some risk, based on Arie Genger's assurances that he did not face a problem from Sagi Genger if he voted the disputed shares. If that was so, and if the Trump Group was able to reach an accord that gave them voting control, all the parties affected by the 2004 Transfers would have been on board. But the lynchpin of the deal was the Genger would rectify the violation of the Stockholders Agreement by ensuring that the Trump Group had voting control. He then reneged on his assurances that the Transfers were a problem by claiming that Funding Agreement could not be

21. In other words, according to Genger's theory, not only is receiving a benefit an indication of ratification, but a step taken during a negotiation to receive a benefit is also. Tellingly, Genger cites no case law supporting his position.

I reject this argument for the following reason: acceptance of the benefit of a voidable transaction is an *alternative* basis upon which to ground a conclusion that a party ratified the transaction. It is a suitable alternative to an express affirmation of the transaction because acceptance of a benefit is a relatively concrete factual occurrence that inspires confidence in a conclusion that, even though the ratifying party did not expressly enunciate her assent to the voidable transaction, she has nonetheless done some "voluntary and positive act" to indicate that assent. *Frank*, 32 A.2d at 283. Negotiations relating to a potential benefit arising from a contractual breach are a less sure foundation upon which to base a finding of a ratification because, as sophisticated commercial parties know, discussions often range across a number of different options, many of which never come to pass. In other words, negotiations about the potential benefit arising from a voidable transaction are unreliable. For that reason they cannot reasonably be considered to induce the other party's reliance, and therefore there is no basis to conclude that the party who suffered the breach is estopped from enforcing the contract. See *Romer v. Porcelain Products, Inc.*, 2 A.2d 75, 76 (Del. Ch. July 28, 1938) (finding that a complaining stockholder was barred by "the estoppel of his acquiescence"); see generally *Frank*, 32 A.2d at 283 ("The defenses of laches, acquiescence, ratification and estoppel all have some element in common."). That is, until the ratifying party actually takes the benefit, there is no basis for the estoppel. For that additional reason, I reject Genger's claim that the Trump Group ratified the 2004 Transfers at the June 25 Board Meeting.

accomplished because Sagi Genger might challenge the substantive fairness of the required stock issuance to the Trump Group.

Of course, the Trump Group received a benefit when it purchased the Sagi Shares from the Sagi Trust and TPR, but that benefit is not an indication of the Trump Group's ratification of the 2004 Transfers. Rather it is consideration of a settlement that resolved the very problem Genger had created. In other words, Genger's argument confuses the benefits that come from compromising claims away in return for a settlement with taking a benefit from a voidable transaction that indicates ratification. A benefit that indicates ratification is one where the ratifying party would be getting something for nothing if she were allowed to enforce the contract.¹¹⁹ Here, the Trump Group was not attempting to take advantage of the 2004 Transfers in a way that would have allowed it to obtain more than it was entitled to under the Stockholders Agreement.

By entering into the Purchase Agreement, the Trump Group dealt with the problem that Genger's misconduct had caused it. Genger had just reneged on the compromise Funding Agreement that would have rectified his wrongful behavior, in large measure by claiming that Sagi Genger, as an arguably innocent purchaser for value, would cause trouble and upset any deal. The Trumps reasonably suspected that Genger's resistance was also inspired by his desire to retain control. To address this problem, the Trump Group dealt with both the wrongful transferor, TPR, and the purported transferee, the Sagi Trust, so that it could cover all its bases. In doing so, the Trump Group never

¹¹⁹ See, e.g., *id.* at 278-83 (finding that a stockholder who had benefitted for years from a recapitalization plan "could not accept the benefit offered by the plan and at the same time deny its validity").

accepted the legitimacy of the 2004 Transfers; indeed, its consistent position was that the Transfers were void.¹²⁰ But by binding both TPR and the Sagi Trust, it could resolve the issue of ownership and control over the bloc definitively. That is, under the deal with TPR and the Sagi Trust, the Trump Group extinguished any claims it had against either TPR or the Sagi Trust as to the Sagi Shares in return for a majority stake in the company.¹²¹ Thus, the Trump Group was only attempting to recapture from TPR what it was owed under the Stockholders Agreement: control over Trans-Resources. Indeed, the Trump Group was giving up its right to purchase the shares from TPR at 2004 prices, which likely would have allowed the Trump Group to obtain the Shares for much less than the approximately \$26 million it paid to purchase the Sagi Shares.

The only difference between enforcing its rights under Section 3.2 of the Stockholders Agreement against TPR and acquiring control directly through the purchase of the Sagi Shares was speed. That is, negotiating directly with both TPR and the Sagi Trust had the advantage of providing a quick and certain resolution to the problem, while enforcing Section 3.2 would likely have involved lengthy litigation. Of course, a speedy solution has value, but that value is the benefit of any settlement, and is one of the primary reasons parties settle their disputes. Undermining that incentive cuts against the public's well-established interest in promoting settlement.¹²² At all times, the Trump

¹²⁰ See *supra* pages 16-25.

¹²¹ See *supra* pages 22-24.

¹²² See *Marie Raymond Revocable Trust v. MAT Five LLC*, 980 A.2d 388, 402 (Del. Ch. 2008) ("It is well established that Delaware law favors the voluntary settlement of contested issues. Settlements are encouraged because they promote judicial economy and because the litigants are generally in the best position to evaluate the strengths and weaknesses of their case." (internal

Group took the position that the 2004 Transfers were void, and mentioned that position to Genger and in litigation. All the Trump did by entering into the Purchase Agreement was ensure that, if the Trump Group were proven wrong in litigation about the 2004 Transfers, it had acquired whatever interests Sagi Genger held and, therefore, he was not a further obstacle. By making a deal directly with the wrongdoer whose shares it was entitled to receive under the Stockholders Agreement, the Trump Group settled TPR's violation of that Agreement by accepting the shares on the terms negotiated, rather than under the price setting process of Section 3.2. In this regard, it is also important to note that the Trump Group was entitled to control of Trans-Resources *as of 2004*, when Genger breached the Stockholders Agreement. Genger's secret transfers had deprived the Trump Group of the benefits of the Stockholders Agreement for four years, and it comes with little grace for Genger now to argue that the Trump Group had to wait even longer or else it would relinquish its rights to those benefits.

Finally, I note that finding that the Trump Group did not ratify the 2004 Transfers leads to, in my view, an equitable result, despite Genger's protestations to the contrary. The problem Genger created by his serious, secretive contractual breach — the insertion of Genger's dysfunctional family into the management of Trans-Resources — was precisely what the Stockholders Agreement was designed to avoid.¹²³ The Trump Group could only rectify that problem outside of litigation by negotiating with TPR and the Sagi Trust because, by effecting the Transfers, Genger made it impossible to deal with TPR

citations omitted)), *aff'd sub nom. Whitson v. Marie Raymond Revocable Trust*, 976 A.2d 172 (Del. 2009).

¹²³ See *supra* pages 5-8.

alone. Genger's argument that the Trump Group ratified the 2004 Transfers because it dealt with Sagi Genger rather than telling him that the Transfers were void is particularly cynical because Genger himself insisted that the Trump Group not challenge the Sagi Trust's ownership of its Trans-Resources shares.¹²⁴ Genger was the source of all of these problems, and to find that the Trump Group ratified Genger's behavior would only reward him for his own perfidy.¹²⁵ In that regard, Genger's argument that a finding that the Trump Group did not ratify the 2004 Transfers would work an inequity because it would require the unwinding of his divorce settlement is baseless. Genger only has himself to blame for whatever mess his decision to make the 2004 Transfers has caused for his divorce settlement. If Arie Genger's violation of the Stockholders Agreement has deepened the Genger family's internecine feud, that is unfortunate. But it is not the Trump Group's problem, nor is it a basis for an appeal to this court's sense of equity.

2. The Trump Group Holds A Majority Of Trans-Resources' Stock But Is Not Entitled To The Shares Transferred To Arie Genger Personally Or To The Orly Trust

That the purchase of the Sagi Shares was a bargain with TPR and the Sagi Trust that resolved Genger's violation of the Stockholders Agreement also has ramifications for the Trump Group's claims, which include a theory that it has a right to purchase all of the shares TPR transferred in the 2004 Transfers — including the shares transferred to Arie Genger personally and the Orly Trust — under the terms of the Stockholders Agreement. In the Purchase Agreement whereby the Trump Group bought the Sagi Shares, the parties

¹²⁴ See *supra* page 20.

¹²⁵ See 3 FARNSWORTH ON CONTRACTS § 12.20 (3d ed. 2004) ("A person is not permitted to profit by his own wrong at the expense of another.").

included a provision that ensured that, if the 2004 Transfers were found to be improper, the Agreement would be deemed to have been consummated with TPR, not the Sagi Trust.¹²⁶ Thus, the Purchase Agreement was a broad settlement that gave the Trump Group the assurance that it had all its bases covered in regard to the Sagi Shares, and that it would retain control over Trans-Resources. The Purchase Agreement also provided in relation to the shares transferred to Arie Genger personally and the Orly Trust that:

If at any time following the Closing Date, it is determined that Arie Genger is not the record and beneficial owner of the 794.40 shares of Common Stock of the Company purportedly transferred to him by TPR in October, 2004 and/or that the Orly Genger 1993 Trust is not the record and beneficial owner of the 1,102.80 shares of Common Stock of the Company purportedly transferred to such Trust by TPR in October, 2004, and that TPR is determined to be the record or beneficial owner of any such shares, in either or both cases by virtue of the transfer of such shares being deemed to have been void or for any other reason (the shares being so affected being referred to herein as the "Affected Shares") *then TPR shall promptly transfer 64% of the Balance Shares* (as such term is defined in the Stockholders Agreement dated March 30, 2001, among TPR, TR Investors, Glenclova and the Company (the "Stockholders Agreement")) to TR Investors and Glenclova in accordance with the terms of Section 1.6 of the Stockholders Agreement whether or not such agreement is then still in effect.¹²⁷

Thus, the Purchase Agreement provided that, if the transfer of TPR shares to Arie Genger and the Orly Trust was found to be improper, then 64% of the Balance Shares¹²⁸ would be transferred from TPR to the Trump Group.

Although the 2004 Transfers violated the terms of the Stockholders Agreement, which in Section 3.2 provides that the Trump Group can purchase all of TPR's shares, the

¹²⁶ See *supra* pages 23-24.

¹²⁷ Purchase Agreement § 11 (emphasis added).

¹²⁸ See *supra* page 10.

Trump Group cannot purchase the shares transferred to Arie Genger or the Orly Trust because the Trump Group must abide by the settlement terms to which it agreed in the Purchase Agreement. Because the 2004 Transfers violated the Stockholders Agreement, Arie Genger and the Orly Trust have been found to not be the record or beneficial owners of the shares transferred to them. Per Section 11 of the Purchase Agreement, that entitles the Trump Group to 64% of the Balance Shares, and nothing more beyond the Sagi Shares that it has already bought. As to the Transfer from TPR to Arie Genger himself, the major problem was the lack of notice. Under the Stockholders Agreement, Genger could receive shares from TPR so long as he: (1) gave proper notice to the Trump Group entities; and (2) signed on to the Stockholders Agreement.¹²⁹ He did neither and, as a result, cannot exercise any rights under the Stockholders Agreement. Although the Trump Group believes that Genger's violation should require him to transfer all of his Trans-Resources shares to the Trump Group, that remedy is disproportionate. That sort of relief is unnecessary to this control dispute and therefore this § 225 action. Nevertheless, Trans-Resources appears entitled, in any event, to deny Genger the right to vote his shares until he gives formal notice and signs on to the Stockholders Agreement. As to the Orly Trust, it is not before the court, and the shares it was wrongly transferred are also not necessary for the Trump Group to exercise control. Therefore, I do not issue any ruling as to those shares, because that is unnecessary in this § 225 action.¹³⁰

¹²⁹ Stockholders Agreement § 2.1.

¹³⁰ See *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997) (discussing that a § 225 proceeding should generally only resolve issues affecting

Obviously, my finding that the shares were wrongly transferred creates problems for Arie Genger, but that exposure is a result of his own secretive contract breach.

D. The Trump Group Did Not Take The Sagi Shares Subject To The Proxy

Even if the Trump Group ratified the 2004 Transfers — which it did not — it would still have voting control over Trans-Resources because it did not take the Sagi Shares subject to the Proxy. That conclusion is required for two reasons.

First, the language of the Proxy itself does not plainly indicate that the Proxy was to run with the Shares if they are sold. The explicit terms of the Proxy establish that it only applies so long as the Sagi Trust owns the Shares. For example, the Proxy states that the Sagi Trust appoints Genger “to vote as *its* proxy, all shares of common stock of TRI which are not or hereafter *owned by the Trust*.”¹³¹ Also, it permits Genger to vote only “in the same manner and to the same extent as *the Trust* might, were *the Trust* present at said meeting.”¹³² In this regard, the Proxy is different, for example, from the proxy at issue in *Haft v. Dart Group. Corp.*, which gave the proxy holder the “right to exercise all rights to vote *the Shares* on all matter on which *they* are entitled to vote.”¹³³ Here, the Proxy does not give Genger the right to vote on all matters in which the Sagi Shares are entitled to vote; rather, the Proxy gives Genger the right to vote on all matters in which the Sagi *Trust* is entitled to vote, suggesting that the Proxy does not extend to subsequent owners of the Shares.

voting control of the corporation); *Bossier v. Connell*, 1986 WL 11534, at *2 (Del. Ch. Oct. 7, 1986) (same).

¹³¹ Proxy at 1 (emphasis added).

¹³² *Id.* (emphasis added).

¹³³ 1997 WL 154049, at *2 n.5 (Del. Ch. Mar. 14, 1997) (emphasis added).

Most importantly, the Proxy does not provide in any way for the reservation of voting powers to Genger after such a sale. The only language Genger points to as evidence that the Proxy is meant to run with the Sagi Shares is the phrase that the Proxy “shall continue for the duration of Arie Genger’s life.”¹³⁴ But, in the context of the entire document, that language only means that the Sagi Trust would be bound by the Proxy until Genger died, not that the Proxy would continue to bind later owners if the Shares were transferred. If Genger wanted to keep the Proxy after a transfer, he could have easily inserted clear language — such as “this Proxy shall bind any subsequent transferees” — into the Proxy to that effect. He did not, and thus there is no reason found in the text of the Proxy to indicate that it is binding upon the Trump Group.

Even if the language of the Proxy was ambiguous — which it is not — public policy concerns require that the Proxy be strictly construed. Historically, proxies have been interpreted narrowly and when there is an ambiguity, read as not restricting the right to vote the shares.¹³⁵ Recent market developments have only reinforced the utility of the presumption that irrevocable proxies should be narrowly construed. Separating voting control from stock ownership — which can result in “empty voting,” where an investor votes stock without having an accompanying economic interest — raises important

¹³⁴ Proxy at 1.

¹³⁵ See *Eliason v. Englehart*, 733 A.2d 944 (Del. 1999) (finding a proxy to be revocable where the words expressly stating that it was an “Irrevocable Proxy” were only found in the authentication to the document, not in the language of the proxy itself); *Freeman v. Fabiniak*, 1985 WL 11583 (Del. Ch. Aug. 15, 1985) (narrowly interpreting the grant of authority made in a proxy instrument and holding that the instrument, which conveyed the right to vote at shareholder meetings, did not authorize other action by consent); *State ex rel. McKaig v. Bd. of Directors of H.F. Dangberg Land & Live Stock Co.*, 110 P.2d 212, 214 (Nev. 1941) (“The instrument granting the vote by proxy will be strictly construed.”).

public policy concerns.¹³⁶ For example, the decoupling of shareholder voting rights and economic interest, which is increasingly common and only loosely regulated by the securities laws,¹³⁷ is of concern because empty voting can theoretically allow investors with voting power but with an economic interest adverse to the firm to vote in ways that reduce the company's share price.¹³⁸

Our Supreme Court's recent decision in *Crown EMAK Partners, LLC v. Kurz* underscores the importance of those public policy concerns.¹³⁹ There, the Supreme Court affirmed this court's decision that third-party vote buying merits judicial review when it disenfranchises shareholders by affecting the outcome of a vote, and confirmed this court's conclusion that the voting arrangement at issue was proper.¹⁴⁰ Its reason for so concluding is important: "[w]e hold that the Court of Chancery correctly concluded that there was no improper vote buying, *because the economic interests and the voting interests of the shares remained aligned* since both sets of interests were transferred from Boutros to Kurz by the Purchase Agreement."¹⁴¹ In other instances, the temptations for self-dealing that arise when persons with a relatively small economic interest in a

¹³⁶ See Henry T.C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. LAW. 1011, 1014 (2006) ("*Empty Voting*"); see also Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775.

¹³⁷ See Henry T.C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625 (2008)

¹³⁸ See *Empty Voting* at 1014.

¹³⁹ 992 A.2d 377, 388 (Del. 2010) ("For many years, Delaware decisions have expressed consistent concerns about transactions that create a misalignment between the voting interest and the economic interest of shares.") (citations omitted).

¹⁴⁰ *Id.* at 388-90.

¹⁴¹ *Id.* at 390 (emphasis added).

corporation has voting control have resulted in serious harm to the corporation and its other investors.¹⁴²

In light of those concerns, a proxy purporting to irrevocably decouple voting rights from economic interest should be strictly construed. Because there is no such clear intent manifested in the Proxy here, prudent public policy requires the conclusion that the Proxy does not survive the sale of the Sagi Shares to the Trump Group.

Second, the Proxy is not irrevocable because it does not satisfy § 609 of the New York Business Corporation Law, which I conclude governs the Letter Agreement and the Proxy attached thereto in view of the lack of any policy conflict between it and the DGCL.¹⁴³ Section 609 provides that:

A proxy which is entitled “irrevocable proxy” and which states that it is irrevocable, is irrevocable when it is held by any of the following or a nominee of any of the following: (1) A pledgee; (2) A person who has purchased or agreed to purchase the shares; (3) A creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of the proxy if the proxy states that it was given in

¹⁴² See, e.g., *Hollinger Intern., Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004).

¹⁴³ Letter Agreement at 2 (“This Letter Agreement shall be governed by the laws of the State of New York without regard to conflicts of law principles.”). Given Delaware’s respect for contractual freedom, see *Abry Partners V, L.P. v. H&W Acquisition LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006) (noting that “there is also a strong American tradition of freedom of contract, and that tradition is especially strong in our State” and citing authorities), it respects choice of law agreements. See *J.S. Alberici Const. Co., Inc. v. Mid-W. Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000) (“Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction.”). Although our law relating to the voting of corporate shares is of paramount interest to Delaware, there is no offense to Delaware of allowing parties to subject agreements about irrevocable proxies to a law that places different strictures on such proxies than does Delaware law, absent some reason that those strictures offend a fundamental protection by the DGCL. Section 609 of the N.Y. Bus. Corp. Law does not conflict with any fundamental Delaware corporate law policies or doctrines. Therefore, I find no reason to apply Delaware law in a situation where the parties have made a clear choice of law in favor of a sister state.

consideration of such extension or continuation of credit, the amount thereof, and the name of the person extending or continuing credit; (4) A person who has contracted to perform services as an officer of the corporation, if a proxy is required by the contract of employment, if the proxy states that it was given in consideration of such contract of employment, the name of the employee and the period of employment contracted for; (5) A person designated by or under paragraph (a) of section 620.¹⁴⁴

Genger obviously does not qualify under sub-sections (1), (2), (3), or (4) — that is, he is not a pledgee, creditor, contract officer, or purchaser of the Shares sold to the Sagi Trust. And, he does not qualify under sub-section (5), because § 620 of the New York Business Corporation Law applies to an agreement “between two or more shareholders,” and neither Genger nor the Sagi Trust were shareholders of Trans-Resources when the Letter Agreement and the Proxy were executed.¹⁴⁵ Thus, the Proxy is not irrevocable under New York Law, and was revoked by the sale of the Sagi Shares to the Trump Group.¹⁴⁶

IV. Conclusion

Genger violated the Stockholders Agreement when he made the 2004 Transfers, and the Trump Group did not ratify those Transfers after the fact. Furthermore, the

¹⁴⁴ *N.Y. Bus. Corp. Law* § 609; *cf.* 8 *Del. C.* § 212(e) (providing that a duly executed proxy will be deemed irrevocable where it: (1) states that it is irrevocable; and (2) is coupled with an interest sufficient in law to support an irrevocable power, regardless of whether the interest is in the stock itself or the corporation generally).

¹⁴⁵ *N.Y. Bus. Corp. Law* § 620.

¹⁴⁶ *See Tompers v. Bank of Am.*, 217 N.Y.S. 67, 75 (N.Y. App. Div. 1926) (holding that a revocable proxy terminated “through sale of . . . stock”). Even if the Proxy were irrevocable, Genger would still be bound to vote his shares for a majority of the Trump Group’s directors because the Stockholders Agreement provides that “the group owning the greater number of shares as between the TPR Stockholders and the Non-TPR Stockholders shall designate four directors.” Stockholders Agreement § 1.2. That is, Genger would have to vote the Proxy for the Trump Group’s directors, because the Trump Group is indisputably the owner of a majority of Trans-Resources’ shares. Economic ownership trumps, so to speak, any interest Genger has as an owner of the Proxy.

Trump Group did not take the Sagi Shares subject to the irrevocable Proxy. Therefore, the Trump Group retains the Sagi Shares,¹⁴⁷ is entitled to 64% of the Balance Shares, and can vote all of the Trans-Resources shares it holds as it wishes. The parties shall submit an implementing order by Wednesday, July 28, 2010.

¹⁴⁷ Genger's claim that he is entitled to purchase the Sagi Shares under § 3.2 of the Stockholders Agreement because the Trump Group pledged (a disputed amount of) those Shares to a party from which they obtained purchase financing fails because Genger never signed on to the Stockholders Agreement. Tr. 950 (A. Genger). Until he accepts the burdens of that contract, Genger cannot expect to enjoy its benefits. *See, e.g., Red Clay Educ. Ass'n v. Bd. of Educ. of Red Clay Consol. School Dist.*, 1992 WL 14965, at *10 (Del. Ch. Jan. 16, 1992) (holding that plaintiff could not "accept the benefits of a contract without also bearing the corresponding burdens"). Furthermore, Genger cannot now claim entitlements under a contract that he intentionally flaunted. *See PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014-15 (Del. Ch. 2004) (holding that a party that repudiates or breaches a contract cannot then claim the benefits of that contract).

JAN 02 2009

SURROGATE'S COURT : NEW YORK COUNTY

----- X
In the Matter of the Trust Established
on December 13, 1993, by ARIE GINGER
for the Benefit of ORLY GINGER.
----- X

File No. 0017/2008

R O T H , S .

This is a contested application by the primary beneficiary
(Orly Genger) of an irrevocable inter vivos trust established by
her father, Arie Genger, seeking the appointment of a successor
trustee or, alternatively, the appointment of a "special trustee"
to investigate alleged wrongdoing concerning the trust.
Petitioner's mother, Dalia Genger (grantor's former wife),
contends that she is the duly appointed successor trustee and
that there is no basis to appoint another fiduciary for any
purpose.

The trust agreement, dated December 13, 1993, provides for
discretionary income and principal distributions to Orly for life
with remainder to her descendants or, if none, to the grantor's
descendants in trust.

Article SEVENTH (B), (D), (E), and (G) of the trust
instrument sets forth the following procedure for the resignation
of trustees and the appointment of their successors.

A trustee may resign by delivering a signed and acknowledged
instrument of resignation in person or by certified or registered
mail to the other trustee and to either the grantor or the income
beneficiary. Such resignation is effective upon the receipt of
the acknowledged instrument by the other trustee (if there is

one) and the grantor or the income beneficiary or at such later date as may be specified in the instrument.

A trustee may appoint his or her successor by delivering a signed and acknowledged instrument in the same manner as described above for resignation. Any such appointment, however, is valid only if the appointee qualifies by delivering a signed and acknowledged instrument of acceptance in person or by certified or registered mail to each trustee and the grantor or the income beneficiary within 30 days after the later of 1) the date on which a copy of the appointment instrument is delivered to him or her, and 2) the effective date of the appointment as set forth in the appointment instrument. It is observed that there is no provision that requires a resigning trustee to appoint a successor or that there always be two trustees in office.

The original two trustees served until October 2004, when they resigned and appointed David Parnes and Eric Gribitz as their successors. On February 12, 2007, Mr. Gribitz resigned without appointing a successor. On April 26, 2007, Mr. Parnes resigned and appointed as his successor Leah Fang in a signed and acknowledged instrument. Although Ms. Fang noted her acceptance at the bottom of such instrument, her signature was not acknowledged. However, in another document entitled "Release" executed and acknowledged by Ms. Fang the same day, she, as

trustee, purported to discharge Mr. Parnes from liability. It is undisputed that thereafter Ms. Fang acted as trustee. Indeed, Ms. Fang's contention that she received a number of requests for information from petitioner and that petitioner referred to her in writing and orally as trustee is not disputed by petitioner.

On December 12, 2007, Ms. Fang, without resigning in accordance with the trust agreement, attempted to appoint Patricia Enriquez, as successor trustee. Her designation of Ms. Enriquez, however, was by an unacknowledged letter in which she referred to her own resignation as taking effect upon Ms. Enriquez's acceptance of the appointment. Ms. Enriquez accepted by signing the letter, but such acceptance was not acknowledged and, in any event, there is nothing in the record to suggest that such "acceptance" was delivered in accordance with the trust instrument. Two weeks later, an attorney for Ms. Enriquez notified petitioner's counsel by email that her client had advised that she had no intention to overcome the procedural omissions.

On January 3, 2008, Ms. Fang and Dalia Genger signed before a notary a memorandum in which Ms. Fang stated that "to the extent that I am still vested with any powers to appoint trustees of the [trust], I confirm your appointment." The next day, Ms. Fang executed an acknowledged instrument of resignation and appointment of successor trustee naming Dalia as her successor

and Dalia, on the same day, executed an acknowledged instrument of acceptance. It is undisputed that such documents were delivered in accordance with the trust requirements.

We address first that portion of the instant application which seeks the appointment of a successor trustee on the ground that Dalia was not validly appointed. In such connection, petitioner argues first that, because Ms. Fang's signature on the bottom of Mr. Parnes's appointment instrument was not acknowledged, she never accepted the position in accordance with the trust agreement (and thus could not appoint Dalia her successor). However, such argument ignores the "Release" mentioned above that Ms. Fang executed the same day. Such instrument, which was signed and duly acknowledged, unequivocally establishes Ms. Fang's acceptance of the position. Since petitioner does not challenge the authenticity of such instrument or Mr. Parnes' contention, supported by the record, that it was delivered in accordance with the trust instrument and, as noted above, petitioner thereafter communicated with Ms. Fang as trustee, Ms. Fang properly qualified as successor trustee.

Petitioner's second argument that, in any event, Ms. Fang's appointment of Dalia was ineffective because Ms. Fang had previously resigned as trustee is also without merit. Simply put, Ms. Fang had not previously resigned because her letter to Ms. Enriquez did not contain the formalities (i.e., an

acknowledgment) required by the trust agreement. Moreover, although not a model of clarity, the letter makes clear that Ms. Fang did not intend to leave the trust without a trustee in the event that Ms. Enriquez failed to qualify, which is exactly what happened. Thus, Ms. Fang had authority to appoint Dalia as her successor.

Since there is no dispute that the instrument of resignation and appointment executed by Ms. Fang on January 4, 2008, and Dalia's instrument of acceptance of the same date were executed and delivered in accordance with the trust agreement, Dalia is the duly appointed successor trustee of the trust. To find otherwise would be to ignore the chronology of events and the purpose of the provisions at issue, namely to ensure that the trust always has a fiduciary ready, willing and able to act. The fact that petitioner does not wish her mother to be the fiduciary because she considers her an adversary in a broader intra-family dispute does not provide a basis to ignore the grantor's intent, as reflected in the trust instrument, that an acting trustee, and not the beneficiary, decides who shall become a successor trustee. Accordingly, petitioner's application to appoint a successor trustee is denied.

We next turn to petitioner's alternate request for relief, namely that a "special trustee" be appointed for the "purpose of investigation and taking discovery with respect to the wrongful

dealings concerning the assets and income of the trust."

It is noted initially that petitioner's only allegations of "wrongful dealings" concern a close corporation, TPR Investment Associates, Inc. She contends that her brother Sagi, who is an officer of TPR, and Dalia, who was a shareholder at the time this proceeding was commenced, are engaged in a "wrongful scheme" to divert assets to themselves and, as a result, Dalia "could not possibly" investigate wrongdoing at TPR, which the petition describes as the "greatest" asset of the trust.

However, the premise of the application, namely that the trust's interest in TPR would enable the trustee to investigate or seek relief from TPR, does not appear to be correct. Petitioner does not dispute Dalia's assertion, supported in the record, that the trust is not a shareholder of TPR at all. Rather, D&K LP, an entity in which the trust owns a 48 percent interest, in turn owns approximately 50 percent of TPR. Petitioner does not explain what appears to be a material misstatement concerning TPR's relationship to the trust. Nor does she identify how a trustee under such circumstances might be in a position to "investigate and address the TPR issues".

In any event, assuming arguendo that a trustee would somehow be able to investigate alleged misconduct at TPR, petitioner's vague and speculative allegations of "wrongful conduct" at TPR from which Dalia purportedly benefitted do not warrant the

appointment of a "special trustee". Similarly, petitioner's allegations (made upon information and belief) that Dalia had knowledge of alleged improper acts by former trustee, David Parnes, in relation to TPR are patently insufficient to warrant the remedy of a "special trustee". In such connection, it is noted that Mr. Parnes and Ms. Fang have been directed to account for their proceedings as trustees (Matter of Genger, NYLJ, Feb. 25, 2008, at 29, col 3), giving petitioner a forum to seek relief for most of the conduct about which she complains.

Finally, it is observed that petitioner has not alleged that Dalia has refused a request for information, which would warrant relief (SCPA 2102), or has failed as trustee to protect trust assets. Indeed, it appears that Dalia (who states that she is ready and able to act as fiduciary) has yet to assume the duties of trustee in deference to her daughter's position in this litigation. As a validly appointed trustee, she should be given the opportunity to do what she deems necessary to manage and protect the trust's assets.

Based upon the foregoing, the appointment of a "special trustee" is unwarranted at this time and, accordingly, the application is denied, without prejudice to renewal if future

circumstances warrant such relief.

This decision constitutes the order of the court.

S U R R O G A T E

Dated: December 31, 2008

2 SUPREME COURT OF THE STATE OF NEW YORK

3 COUNTY OF NEW YORK : TRIAL TERM: PART 12

----- X

4 ARIE GINGER and ORLY GINGER, in her
5 individual capacity and on behalf of
6 THE ORLY GINGER 1993 TRUST,

6 Plaintiffs,

7 - against -

8 SAGI GINGER, TPR INVESTMENT ASSOCIATES,
9 INC., DALIA GINGER, THE SAGI GINGER 1993
10 TRUST, ROCHELLE FANG, individually and
11 as trustee of THE SAGI GINGER 1993
12 TRUST, GLENCLOVA INVESTMENT COMPANY,
13 TR INVESTORS, LLC, NEW TR EQUITY I, LLC,
14 NEW TR EQUITY II, LLC, JULES TRUMP,
15 EDDIE TRUMP and MARK HIRSCH,

12 Defendants.

13 ----- X

14 Index No. 651089/2010

15 October 26, 2011
16 60 Centre Street
17 New York, New York 10007

17 B E F O R E: HON. PAUL G. FEINMAN, Justice

18

19 A P P E A R A N C E S:

20

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A F T E R N O O N S E S S I O N

THE COURT: Back so soon.

MS. WACHTLER: Apologize for that.

THE COURT: So what's happening?

Dalia has gone to court.

MR. GRIVER: Dalia has gone to court, but not here; she's gone to court in Delaware. And we are asking the Court to put in a temporary restraining order and to enjoin Dalia from continuing to prosecute her duplicative action.

In my papers I cite cases and it's is clear that the Court has the equitable power to enjoin Dalia in order to protect Orly, protect the court and preserve this court's jurisdiction. And so I think I'm going to spend a little time talking to you about why the Court should impose a TRO.

First, there's no question that the case that Dalia started is duplicative. It has the exact same legal issue as what's before the Court in the 2010 matter, the beneficial ownership of the TRI shares. That's it. If you compare the first count of the third amended complaint before your Honor and the first count of Dalia's case in Delaware, they're the same. They both make claims as to who owns the beneficial ownership of the exact same shares.

More importantly, there's no reason that the case

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2 should be in Delaware. Everything is in New York and this
3 is where this issue should be decided. Dalia isn't a
4 resident of Delaware. She lives in New York. Orly lives
5 in New York. The Orly Trust is a New York trust.

6 THE COURT: There aren't too many places in
7 Delaware -- I shouldn't say this on the record -- there are
8 a couple of beautiful places in Delaware along the shore,
9 Bethany, I think, is the name of the town, and Rehoboth,
10 Delaware and some of the towns up along that coastline are
11 beautiful. And other than the credit cards, you like to be
12 in Wilmington, there's not too many places to --

13 MS. WACHTLER: You're not convincing me.

14 THE COURT: The shoreline is beautiful. But any
15 way, you're right, they don't live in Delaware.

16 MR. GRIVER: They don't. The Orly Trust, it
17 calls for the application of New York law. TPR is located
18 in New York. All the contracts at issue are located in New
19 York. The stipulation and divorce decree is New York. The
20 divorce is a New York divorce. The marriage was a New York
21 marriage. All the parties necessary for determination of
22 this issue are before this Court.

23 THE COURT: If they had gone to a bet din in
24 Israel then maybe we wouldn't have had all these problems.

25 MR. GRIVER: Maybe. But Orly chose to be here.
26 All kidding aside, Orly chose to be here and she chose to

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be here 15 months ago. She asked this court to decide this. Dalia is in this court. The Orly Genger Trust is in this court. There are parties that should be part of this decision, a part of this adjudication that are not in Delaware. Orly, for example, is not part of that suit. Arie is not part of that suit.

You know, I made a list of all of the reasons that this case should be in New York and then I made a list of why this case is now in Delaware and I came up with one, and that's Chancellor Strine. Delaware should be the last place that the Orly Trust would want to be because Chancellor Strine, as you know from the papers, or perhaps you don't, already ruled on this issue and ruled against the Orly Trust.

The Orly Trust actually has that as part of her complaint in the action that she's brought. She actually talks about the fact that the court that she chooses to be in front of has already ruled against her. That's paragraph 34 of her complaint. And she's absolutely right, because this court ruled in paragraph 8 of its final judgment that TPR owned the trust, not -- that TPR owned the TRI shares, not the Orly Trust. And what this case is designed to do, your Honor, is get this case in front of a judge that has already decided this issue against the trust.

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2 Now, granted, it should not have made that
3 decision. It made that decision as part of an in rem
4 proceeding. It had no right to make that decision. The
5 Delaware Supreme Court reversed it and they reversed it
6 saying, look, you don't have, among other things,
7 jurisdiction over the Orly Trust.

8 So Dalia did that. And just last night, your
9 Honor, the Trump Group filed an answer to a motion to
10 dismiss. And on page 31 of their brief --

11 THE COURT: Motion to dismiss in Delaware.

12 MR. GRIVER: Yes, the motion to dismiss the
13 Delaware action. They tried to bring a plenary proceeding
14 and that's being opposed because --

15 MR. MEISTER: Excuse me. That's not the Orly
16 action.

17 MR. GRIVER: This is another case in Delaware.

18 THE COURT: Okay.

19 MR. GRIVER: That involves the Trump Group and
20 the attempt to sue TPR and Arie Genger over the Arie Genger
21 portion of the TRI shares.

22 THE COURT: Okay. Arie Genger.

23 MR. GRIVER: Yes. And Arie Genger has moved to
24 dismiss saying, among other things, "You don't have
25 jurisdiction over me. You don't have personal jurisdiction
26 over me."

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2 But the Trump Group filed papers there and they
3 said -- and this is on page 31. I'll give a copy to you
4 and your Honor, if you'd like -- they say the Orly Trust is
5 now before this court. And they drop a footnote and they
6 say, "On October 4, 2011, Dalia Genger, as trustee, filed
7 an action in this court on the Orly Trust behalf seeking a
8 determination as to beneficial ownership and, accordingly,
9 this court now has the power to make these decisions."

10 This could not have been an accident. This has
11 to have been the intent. And, your Honor, the cases are
12 clear that in a situation like this, the first filed
13 authority, that is you, protects its authority and the
14 desire --

15 THE COURT: It's about time I won something,
16 right?

17 MR. GRIVER: And the desire of Orly Genger.

18 And, finally, you have to ask yourself, why is
19 Dalia doing this? And more importantly, is Dalia really
20 going to protect the Orly Trust?

21 THE COURT: Better going into it having the judge
22 on your side, right? She knows that.

23 MR. GRIVER: I think the Court has to ask itself
24 who is more likely to protect the assets of the Orly Genger
25 Trust; is it Orly Genger, the beneficiary, or is it Dalia
26 Genger as trustee?

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2 And the Court knows because we've put it out
3 before you --

4 THE COURT: Well, let me ask you. I haven't
5 asked this before. But if you are so convinced that Dalia
6 is set about ruining her daughter financially or helping
7 the brother ruin the daughter financially, why not go back
8 to the Surrogate's Court and renew your application to
9 remove her?

10 MR. GRIVER: You know, we thought about that, but
11 there's differences between the two actions. There's a
12 reason why there are two actions. We are seeking to remove
13 Dalia. What Dalia has done is going to be placed on top of
14 everything else she has done as a reason that she needs to
15 be removed. But the issue of the beneficial ownership of
16 the shares is before this Court and the issue of the
17 beneficial ownership of the shares Dalia is now trying to
18 place in front of the Delaware court.

19 THE COURT: I understand the issue. I was just
20 wondering.

21 MR. GRIVER: We will make this known to the
22 Surrogate Court. The Surrogate Court is in the midst of
23 its application. It is moving at its own speed. What we
24 need is we need a TRO to protect --

25 MS. WACHTLER: December.

26 MR. GRIVER: -- there's been a motion to dismiss

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2 pending since, I believe, December 12th of 2010, with all
3 deliberate speed.

4 THE COURT: The 60-day rule doesn't apply there.

5 MS. WACHTLER: I don't think any rules apply in
6 the Surrogate's Court.

7 MR. GRIVER: Mr. Meister practices there more
8 than I do.

9 THE COURT: 120 is on the outside.

10 MR. MONTCLARE: That court is very overworked,
11 Judge, really, truthfully.

12 MR. GRIVER: There are only two surrogates.

13 THE COURT: They have a staff that I tell you is
14 unrivaled. It is what it is. Okay.

15 MR. GRIVER: It is what it is.

16 THE COURT: The bottom line is you have the
17 application pending. I didn't remember that or maybe I
18 didn't know that and that's why I didn't remember that.

19 MR. GRIVER: Right. We do have an application
20 pending and we actually put in an affidavit from Judith
21 Seigel-Baum, who is Orly's lawyer in the surrogate
22 proceeding, to explain the difference between the two
23 actions and why this is the only court who can protect Orly
24 in this case. She can't go to Delaware without placing
25 herself under the jurisdiction of that court, which she
26 does not want to do.

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2 THE COURT: She doesn't want to do it for the
3 same reason they want to do it. I understand that.

4 MR. GRIVER: But she's faced with a Hobson's
5 choice.

6 THE COURT: Who was it who said, you know, the
7 goal here is to get everything in one court with
8 jurisdiction. Was that the Southern District who dropped
9 that footnote?

10 MR. GRIVER: That was the Delaware Supreme Court
11 suggested New York.

12 THE COURT: Right.

13 MR. GRIVER: Justice Solomon a few weeks ago --

14 THE COURT: I think they actually suggested the
15 Southern District.

16 MR. MONTCLARE: Like a court in New York like the
17 Southern District. And the reason for that, Judge, just so
18 you know, is that in the briefing that was brought up by
19 the other side that there's already a case in the Southern
20 District.

21 MR. GRIVER: Right. But all of the cases that I
22 cite stand for the proposition that a court has equitable
23 power to do this and must do this because it should not
24 permit another court proceeding to interfere with its
25 determination of issues that are already before it.

26 THE COURT: The question is, whether it would

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2 render any order that I might issue ineffectual.

3 So what say you?

4 MR. MEISTER: Let me answer in similar aspects.

5 First, just to apprise the Court, this morning,
6 in the Delaware action, the Trump Group and TRI filed an
7 answer and counterclaim seeking a determination from that
8 court. The Orly Trust does not beneficially own the
9 shares. So issue is joined, addressed to the question of
10 the stay, which would prohibit Dalia from prosecuting the
11 Delaware action. If that stay were granted, presumably she
12 wouldn't respond to the counterclaim.

13 So I think starting with a balance of harms --

14 THE COURT: Well, wait a minute.

15 There's a stay in effect. It's not like she's
16 going to lose her right to reply if and when such stay is
17 vacated. I mean I'm not expert on Delaware civil
18 procedure, but I can't imagine a code that would --
19 Delaware is a great court of equity, the chancellor's
20 court, that's going to say you lose your right to reply to
21 a counterclaim because you were stayed.

22 MR. MEISTER: I don't know, your Honor. We just
23 found out about it literally this morning.

24 THE COURT: That may not be your strongest
25 argument, that she's going to lose her right to respond to
26 the counterclaim because I find that hard to believe.

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2 MR. MEISTER: Let me then answer on the
3 question --

4 THE COURT: If necessary, you could always
5 fashion a stay such that "but for her right to file her
6 reply to a counterclaim," you know.

7 MR. MEISTER: Let me answer then on, if you will,
8 the points under the heading of probability of success of
9 this motion.

10 First, my colleague says that this action before
11 your Honor seeks the determination of the beneficial
12 ownership and cites the first count in the complaint. The
13 first count -- I have it in front of me -- Orly is not a
14 party to. It's a claim by Arie that seeks, in effect, to
15 undo the whole kit and caboodle from the divorce.

16 Arie and Orly are parties on the second count.
17 The second count, even more tellingly, doesn't seek to
18 recover the TRI shares for the Orly Trust any more than the
19 first does. The second count seeks to recover the TRI
20 shares, if you will, for Arie. They seek a constructive
21 trust against the Orly Trust in favor of Arie.

22 And what that seeks in those two counts is that
23 the TRI shares go back to TPR and that TPR shares go back
24 to Arie for his life. In other words, this is an attempt
25 to renegotiate the seven-year-old divorce settlement
26 agreement.

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2 But what it isn't is, it isn't a claim seeking to
3 recover for the Orly Trust the TRI shares, as Orly in her
4 affidavit in support of the motion here says. Those
5 issues, with much respect, are not before your Honor. They
6 haven't been brought before your Honor. In fact, the Orly
7 Trust is not before your Honor.

8 Dalia Genger is a defendant in the action in her
9 capacity as, if you will, former wife and party to the
10 separation stipulation and the attempt to undo seven years
11 of whatever, due to Arie's concealing the fact that there
12 was a consent needed from the Trumps.

13 I would add as further evidence of this that TRI,
14 the issuer of the shares in question, was not even added to
15 this action as a party until the supplemental summons was
16 filed on September 20th of this year.

17 Now, as to Orly Trust not being a party, I
18 emphasize that Dalia is a party in her individual capacity
19 and, respectfully, Orly, although she is a beneficiary, she
20 is not the sole beneficiary, as one of the affidavits says,
21 I think it's Ms. Seigel-Baum, who should know better
22 because my first motion to dismiss her complaint --
23 petitioner, I should say -- in the Surrogate Court, was the
24 failure to join the other beneficiary, which is a
25 contingent beneficiary coming into existence if she doesn't
26 have children during her life.

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2 But it's a basic question of trust law. The
3 trustee has discretion to do things with the corpus of the
4 trust of which the attempts to get these shares declared
5 beneficially owned by the trust is quintessentially a right
6 of the trustee. It's not the beneficiary.

7 The fact that the trust agreement says it's
8 governed by New York law is interesting but irrelevant. It
9 doesn't affect who owns the shares. The fact that the
10 beneficiary happens to live here and in fact the trustee
11 happens to live here is also irrelevant.

12 In essence -- oh, the last thing I should say is
13 to the degree that there are claims asserted in this action
14 before your Honor, all of the defendants have moved to
15 dismiss those claims. And at the request of counsel for
16 Arie, the briefing on that was extended so that those
17 motions won't be fully briefed until December 9th.

18 Respectfully, I can't speak for the other ones.
19 We feel pretty confident about our motion to dismiss the
20 motion to, in effect, undo the divorce, which is what Dalia
21 is being sued for in this action.

22 Some of the moving affidavits, particularly
23 Ms. Seigel-Baum's, talks about the other action --

24 THE COURT: Why the rush in Delaware?

25 MR. MEISTER: Why the rush?

26 THE COURT: Yes.

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2 MR. MEISTER: I don't know --

3 THE COURT: Why not let this work its way through
4 and why, at the end of the day, if Delaware needs to rule,
5 let them.

6 MR. MEISTER: Well, the end of what day, your
7 Honor? The issues aren't before your Honor.

8 THE COURT: The end of the case -- well, so say
9 you, not so say them.

10 MR. MEISTER: Well, that's true. They don't say
11 that but their pleading does. Your Honor, respectfully, is
12 bound by the pleading, not by what my colleague across the
13 way suddenly says is before your Honor and is not before
14 your Honor. It is before Judge Keenan in the Southern
15 District of New York where they have made an application
16 for permission to make a motion to dismiss or stay. That
17 will be discussed with Judge Keenan November 3rd.

18 MR. MONTCLARE: That's a motion to stay based on
19 abstention.

20 MR. MEISTER: Among other grounds -- that's
21 solely? Okay. I haven't seen your motion yet.

22 MR. GRIVER: It's abstention based on the fact
23 that this is a New York divorce proceeding and federal
24 courts generally give deference to a New York court.

25 MR. MONTCLARE: And even under Colorado River
26 abstention, Judge, which is basically there's two exact set

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2 of motions filed in both courts on the same day with the
3 same return dates, you're going to have two courts -- and
4 they're very complicated motions -- it's just senseless to
5 proceed in two courts.

6 THE COURT: What if the other judge is smarter
7 than I am, should I let him do it or her?

8 MR. MEISTER: He's probably wondering the same
9 question in the obverse.

10 MR. MONTCLARE: We're sitting with Judge Keenan
11 on, I think, next Thursday.

12 MS. WACHTLER: On November 3rd.

13 MR. MONTCLARE: And he's going to address our
14 abstention motion and a briefing schedule generally on the
15 motions to dismiss.

16 MR. MEISTER: So returning to the question you
17 put to me. Frankly, the reason to get this decided is to
18 get it decided, you know, this has been hanging around now
19 since 2008 when the Trumps first filed their first action.
20 I think the federal case has been pending since 2008.

21 If we can defeat the Trumps' argument that the
22 Only Trust is precluded by collateral estoppel or
23 res judicata from contending that the shares belong to the
24 trust, and we hope we can, it puts us in a position to
25 negotiate with them because, when all is said and done,
26 there are two ways this can wind up.

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2 The shares can wind up --

3 THE COURT: Now Dalia is going to stand up to the
4 Trumps on behalf of Orly's beneficial interest?

5 MR. MEISTER: Yes.

6 THE COURT: Okay.

7 MR. MEISTER: I mean the action down there is not
8 to find out who owns the shares as they characterize it.
9 It seeks a declaration that the Dalia -- that the Orly
10 Trust is the beneficial owner of the shares.

11 Now, that may be a tough argument, even apart
12 from the collateral estoppel issues, which we feel a little
13 bit better about, and it may be a tough argument, but we're
14 entitled to try to make it.

15 If we make it, then the Trumps Group beneficially
16 own the shares and the trust does, which I think would
17 strengthen any hand in negotiation. If for some reason it
18 loses, then we have an action, an interpleader action, as
19 your Honor knows, dealing with the \$10.3 million which was
20 paid by the Trump Group, assuming they had the right to
21 purchase the shares. And that would put at least
22 \$10.3 million to the benefit of the trust, which at the
23 moment is sitting, you know, with a corpus solely of this
24 possible right, which we hope it is a right, to the TRI
25 shares.

26 If it gets the TRI shares, they will be sitting

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with shares which don't pay a significant dividend. Any dividends that have been paid have been held in escrow, I'm told, shares that can't be sold to anyone, shares that are pieces of paper, if in fact they're pieces of paper now as opposed to bookkeeping, which would only have value to the organization, the trust, if someone buys them and as a practical matter, there ain't nobody going to buy these things but the Trumps.

So the name of the game seems to be either to increase our leverage with the Trumps, on the one hand, or to get the shares and sit there and hold them in the hopes that the Trumps, in fact, do what counsel have represented in court is their hidden intention, not the Trumps' counsel mind you, of taking the company public for a billion dollars \$2 billion. I've heard various figures thrown out.

But sitting around here and litigating in -- I can't think of how many courts -- one, two, three, four, five courts is not in anyone's interest and the Delaware court seems able to move the case quickly and hopefully with a favorable result. Either way the trust will benefit.

MR. MONTCLARE: Just on behalf of Arie, and it's very important that just --

MR. MEISTER: Can I just object here because Arie, with much respect, shouldn't be a party to this

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2 argument. Arie is trying to take the shares away from --

3 MR. MONTCLARE: We have an interest in these
4 shares as well. We have a voting interest in these shares
5 and I do have an interest and I have to correct absolute
6 mistakes you've just made.

7 The caption in this case is Orly individually in
8 her capacity as a beneficiary of the Orly Trust. She's a
9 plaintiff in this case. She's not a defendant in this case
10 and Dalia is in this case for the reasons that Mr. Meister
11 mentioned, but the main target here is the Trumps. And the
12 idea is that in this constructive trust we believe that
13 Arie has a beneficial interest in the voting rights to
14 these shares. He has a beneficial interest in his own
15 shares obviously.

16 In terms of the matrimonial case, again it's
17 skewed. If you take a look at the relief we're requesting
18 in the first claim, in the reformation cases, we want to
19 put everything back to status quo ante, with the trust
20 having its percentages that it had indirectly before
21 through D & K, which the Court is aware, and that there be
22 distributions during the lifetime of Mr. Genger equal to
23 the exact percentage of the Orly Trust shares as they exist
24 now 19 percent and that only on death it's going to go to
25 Orly, and TPR is going to go back to being unowned by a
26 majority by Mr. Genger without any other assets in it but

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TRI.

It's a little complicated, Judge, but the reality is, is that the issue of beneficial ownership is going to be determined here. The constructive trust issues are going to be determined here. To suggest that it's a smart move because it's quicker to go to Delaware and that they're going to defeat a collateral estoppel decision by the judge who is reversed by the Delaware Supreme Court is unlikely.

And what concerns me is -- and we can't prove this here and I'm not blaming Mr. Meister -- but we think that Sagi is behind all this with his little puppeteer strings saying, "Okay, I'll fix all these problems. We'll get back to Delaware by, one, having TPR, who I control, bringing a separate action in Delaware." The Trump say, "Oh yeah, and we'll sue Arie in Delaware." And now Mr. Meister's client Dalia, all of a sudden, says the trust is going to go into Delaware.

And now all of a sudden they push everything back to Delaware in a court which is an equity court. It's not dealing with issues relating to reformation. It's not dealing with the constructive issues that we're bringing up. And now we have this pleading where they're claiming on the other side collateral estoppel. And you know what it sounds like to me, Judge. It sounds like to me that

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2 there is no adversary proceeding here.

3 And you know -- and then what -- and the question
4 arises to me -- I'll be quiet -- is to why anybody
5 representing the Orly Trust interest or Orly's interests as
6 a beneficiary would intentionally select the court, the
7 only court in the world that has already formed an opinion
8 that she was not truthful in some way or another in her
9 testimony, which he rejected in the case there down in
10 Delaware, and who's made specific rulings adverse to her,
11 which have been reversed by the Delaware Supreme Court.

12 It's just very confusing to me.

13 MR. MEISTER: Your Honor, may I just respond to
14 that?

15 THE COURT: In a moment. Let me hear Mr. Griver.

16 MR. GRIVER: Let me just address some of the
17 things that Mr. Meister said so that Mr. Meister can
18 respond to both of us at once.

19 The reason I pointed out the first cause of
20 action in the third amended complaint before your Honor,
21 there's a second cause of action where Orly is asking for a
22 constructive trust on behalf of her trust, but if you look
23 at paragraph 181(5), it asks that Orly Trust and Sagi Trust
24 each be declared the owner of 24.5 percent of TPR, so
25 together they own the remaining 49 percent of TPR.

26 The reformation that they're seeking will protect

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2 the Orly Trust because the TRI shares will be put back into
3 TPR and then the Orly Trust and the Sagi Trust will be
4 given the equivalent shares of TPR so that they will own
5 the same amount of TRI shares.

6 In a different way, they are asking that the Orly
7 Trust be given the TRI shares back. So it is the exact
8 same lawsuit except we have more people and we have more
9 issues and we actually have context in New York.

10 As for the Orly Trust not being here because
11 Dalia is the trustee, this court already decided in the
12 2009 action before your Honor that Orly has the right to
13 bring an action on behalf of her trust as the sole actual
14 non-contingent beneficiary.

15 And Mr. Meister says that this is a situation of
16 trust law. I would say it's simpler than that. It's a
17 question of who do you trust. And is Dalia really going to
18 be in Delaware fighting tooth and nail the way Orly is
19 fighting here to protect the Orly Trust? I would suggest
20 to you that based on past is prologue, the answer is
21 absolutely not, not just in her choice to go to the worst
22 jurisdiction and get this case before the worst possible
23 judge in the United States of America, but if you think
24 about it look about what happened --

25 THE COURT: Be careful what you say. These
26 transcripts are put up on the Web.

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2 MR. GRIVER: They're going up on the Web and
3 they're being sent directly to Judge Strine.

4 MR. MONTCLARE: They've already been sent to
5 Judge Strine.

6 MS. WACHTLER: Everything we say in this court on
7 the record is put before Judge Strine too.

8 THE COURT: Well, let him know that I actually
9 have vacationed many times in Delaware and think it's a
10 beautiful state on the coastline.

11 MS. WACHTLER: Thank you for that help.

12 MR. GRIVER: Mr. Meister said that the trust
13 doesn't really have anything except these potential
14 interests. That's true. But when Dalia became the trustee
15 of the trust, the trust had a corpus, it had assets. Those
16 have been given away. And the lawsuits about that where
17 the court has held that there are issues of fact as to
18 whether Dalia is acting with fraudulent intent in the
19 things that she do, you denied motions for summary judgment
20 brought by the defendants in the 2009 case. Dalia has
21 acted to dissipate those assets and povertize Orly.

22 With regard to the TPI shares, she allowed Sagi
23 to enforce a D & K note that she had successfully argued to
24 another judge was never to be enforced. With the TRI
25 shares she signed a piece of paper. And what fiduciary
26 does this? She signs a piece of paper that says the

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following: You, Sagi -- who, by this time, is already in litigation with Orly -- you, Sagi, may sell the TRI shares to whomever you want, whenever you want, for whatever price you want. You don't have to tell me about it. And I also hereby absolve you of all liability. I give you a full and complete release for whatever you may do with this power, with this unfettered power. And I'm doing this as a trustee of the trust.

If Dalia is successful in Delaware and the shares go back into the trust, she signed a piece of paper that says sell it, sell it for a penny to the beggar outside in the street and it won't matter to me and I absolve you.

This is not the type of person that you want to have deciding and fighting and clawing about this issue. You want Orly here with Orly's counsel, the way Orly intended 15 months ago when you were placed in charge of this legal issue and you should not as a matter of equity, as a matter of fairness, allow Dalia to do this and then go into the Delaware court and be done with it.

There is no legitimate reason why Delaware is chosen except to allow the Trump Group to win. That is the only possible answer for why they did this. And because of that, your Honor, because just as a general matter someone should not be allowed to remove the jurisdiction of this court in this way.

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2 The general principle that says there should be
3 no duplicative litigation, because what the heck is the
4 Orly Trust doing spending money for another set of lawyers,
5 spending money on another litigation? Why are they not
6 here with Mr. Meister, who is a capable and fantastic
7 attorney, fighting for the Orly Trust along with Orly?
8 That's the way it should be, that's the way it must be and
9 that's why this Court must grant the TRO.

10 And I hope Chancellor Strine reads that.

11 MR. MEISTER: Okay.

12 THE COURT: Careful what you wish for.

13 MR. MEISTER: Two points I'd like to make.

14 First, let me quote, because my friend

15 Mr. Genger --

16 MR. GRIVER: Griver.

17 Are you talking about me?

18 MR. MEISTER: To you.

19 MR. GRIVER: Okay. Griver.

20 THE COURT: Genger is his client.

21 MR. MEISTER: I'm sorry.

22 He says in the second count in this complaint
23 before your Honor seeks a constructive trust for the Orly
24 Trust. Let me read you from page 63, the claim for relief,
25 subparagraph 3: "Upon TPR becoming the record owner of the
26 11,002 shares of TRI stock comprising the Orly Trust TRI

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2 shares, a constructive trust was immediately created in
3 favor of Arie with respect to the Orly Trust shares."

4 MR. MONTCLARE: Subject to the rights. You have
5 to read the whole sentence. It's unfair not to read the
6 whole sentence.

7 MR. MEISTER: "Including but not limited to the
8 voting rights appertinent to such shares, all of which were
9 held by TPR for the benefit of Arie subject to the Orly
10 Trust's right to receive the Orly Trust TRI shares upon
11 Arie's death."

12 So it's not merely my paraphrasing. Those are
13 the words and it seeks not a constructive trust in favor of
14 the Orly Trust. It seeks a constructive trust imposed on
15 the Orly Trust in favor of Arie who is going to keep these
16 shares for life. So as long as we're going to be factual.

17 Secondly, the question of being in a court which
18 found Orly to be untruthful, I would say two things about
19 that. It's not my fault that she made up testimony which
20 was contradicted by her father when she testified that she
21 was at a meeting which her father said she wasn't at and
22 that her father told the Trumps things that were
23 contradicted.

24 But more importantly, her testimony is totally
25 irrelevant and wouldn't be admissible on the issue here of
26 the beneficial ownership of these shares. This is a

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question of interpretation of a contract which is an issue of law. It's a question, if you will, of whether notices were given, and a question of the arguments which the Trump Group made in their motion to dismiss this claim against them, this question of collateral estoppel and res judicata, and now we find ourselves on what I assume is Orly's side of this because we don't think collateral estoppel applies.

I don't know if that was quite what Mr. Montclare was saying, but we don't think we're collaterally estopped and we researched to show and to argue that we're not collaterally estopped to argue that these shares belonged to the Orly Trust beneficially.

As to the voting, that's already been decided by the Supreme Court of Delaware. So I don't know what all this stuff is, but that's not my issue.

MS. WACHTLER: Your Honor, just one thing. I think we're running far afield and I'm not exactly sure where Mr. Meister is going with this. But this is for a TRO to prevent extraordinary litigation which this trust has started for no apparent reason. No one has ever said why this action was brought in Delaware other than what Mr. Griver has shown is the real reason, because Mr. Meister never says it, and to say that things can be adjudicated more quickly in Delaware is just not the case.

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2 And the fact of the matter is we have been trying
3 to get the issue of beneficial ownership determined by this
4 court in the jurisdiction which the trust has chosen, which
5 Orly has chosen, which Arie has chosen, and every time we
6 take a step forward, we're drawn back to somehow them
7 trying to get this court back to Delaware to deprive this
8 court of its jurisdiction and that simply should not be.
9 And that's what this TRO is all about and what this
10 injunctive relief is about, so that we can proceed here
11 where we were told to proceed by the Delaware Supreme Court
12 and where the plaintiffs in this case want to proceed.

13 And to say that he's protecting the interests or
14 Dalia is somehow protecting the interests of the trust by
15 wasting these assets, by starting an interpleader action
16 when the money was safe in an escrow account, by bringing
17 an action in Delaware, by trying to dismiss to our case
18 here for no reason and then taking a contrary position in
19 Delaware, it just seems to me that this really needs to be
20 stopped.

21 MR. GRIVER: Let me just read your Honor a case
22 by the First Department in 2006. It was a unanimous
23 decision and I nothing that Mr. Meister has said takes this
24 case away from this Franco case.

25 It said: "In the interests of preventing
26 duplicative litigation that might lead to conflicting

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2 results, and to prevent the waste of judicial resources and
3 unnecessary legal expenses, the court did not improvidently
4 exercise its discretion by invoking its equity power to
5 enjoin defendants from prosecuting the California action."
6 All you have to do is substitute California for Delaware
7 and this is the situation that we are in.

8 And again, your Honor, the only person who has a
9 real interest in protecting the Orly Trust is Orly, the
10 beneficiary. And even if you don't believe me, fine. New
11 York is the only jurisdiction where both Orly is here to
12 protect herself and Dalia is here to protect herself. Orly
13 is not in Delaware. Orly does not want to be in Delaware.
14 Dalia is here. This is where Dalia lives. Let us have
15 that determination from this judge. Let the judge protect
16 itself. If Dalia is the one who ends up protecting the
17 trust, God bless. If Arie and Orly are the ones who end up
18 protecting the trust, well, God bless us.

19 But if the opposite -- if what I am saying is
20 true, and the fix is in, and there's at least a possibility
21 of that, then this Court is the only one who can stop that.
22 Put in a TRO. Stop them from doing this. Decide the case.
23 If Mr. Meister wants us to go along as quickly as possible,
24 if the other defendants want this case to move along, you
25 know what? I will clear my schedule.

26 THE COURT: Well, I certainly don't think that if

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I were to grant the TRO that it is meant to impugn the integrity of the Delaware Chancery Court, the fix is in. So, again, I just urge you to be careful with your language.

MR. GRIVER: Not with the judge, your Honor, not with the judge. I'm talking about --

THE COURT: You're talking about the cooperation.

MR. GRIVER: I'm talking about the cooperation. I'm talking about the interests of the parties.

MR. MEISTER: May I speak to that, because I did receive this afternoon, or maybe it was late morning, a call from Skadden Arps, who found somewhere in these papers a reference impugning the integrity of the lawyer in Delaware who's representing the Orly Trust, saying that he used to be associated with Skadden, which is true. But he and his firm were on Arie's side in two peripheral matters against the Trumps in the main litigation.

MR. MONTCLARE: Maybe they should be disqualified. I didn't know that.

MR. MEISTER: Well, you probably should. He represented a witness and they apparently filed some affidavit saying Arie was in such pure heart that he couldn't possibly have spoliated the documents which he was found to have spoliated.

So they're going to be bringing that to the

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Court's attention. Frankly, there's no fix in.

THE COURT: All right. What type of schedule are you looking for?

MR. GRIVER: Well, the opposition papers would have to be filed by when?

MR. MEISTER: Where are we? We're in end of October.

MR. GRIVER: Yes.

MR. MEISTER: November 18th, your Honor.

THE COURT: Okay. And reply.

MR. GRIVER: We hit Thanksgiving, don't we?

THE COURT: We certainly do.

MR. MEISTER: We do.

THE COURT: I'm not here the Wednesday before Thanksgiving. It basically looks to me like you're looking for an early December.

MR. GRIVER: Either Friday the --

THE COURT: Maybe the surrogate will rule at the one-year mark.

MR. GRIVER: How about December 7th? That's always a historical date.

THE COURT: Let me get the calendar.

(A discussion was held off the record.)

THE COURT: That was going to be for the argument. I was going to give you 11/18 and start with the

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2 date to come in for the argument and work backwards.

3 Change the date to the 14th for the hearing and the papers
4 in on the 7th. Hearing date December 14, 2:15.

5 MR. GRIVER: The 14th. Papers then due on the
6 5th.

7 THE COURT: I will give you to the 21st.

8 MR. MEISTER: November 21st?

9 THE COURT: Yes.

10 MR. MEISTER: Thank you.

11 THE COURT: And reply December -- file them by
12 the 9th. Can you do that?

13 MR. GRIVER: Yes. Thank you.

14 THE COURT: I granted the TRO and we will see you
15 at 2:15.

16 MR. MEISTER: As written?

17 THE COURT: I was about to bring myself to that
18 point.

19 So I'm signing the proposed order to show cause
20 and we've worked out a schedule for briefing papers of
21 opposition by the 21st of November. Reply papers by the
22 9th of December and oral argument at 2:15 on the 14th of
23 December.

24 I'm inclined to grant the temporary restraining
25 order. It doesn't necessarily mean that it will get
26 continued in the form of a preliminary injunction and

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2 obviously one issue that you need to address is whether it
3 would be appropriate to require any sort of undertaking or
4 a bond pursuant to Article 63, should I actually grant the
5 injunction, Article 63 or 62, anyway, whichever.

6 MR. MONTCLARE: It's 63.

7 THE COURT: It's been a lot of, how shall I put
8 it, concern expressed out in the bar about courts
9 overlooking the mandatory undertaking. So I'm not
10 overlooking it, but I leave it to you to address.
11 Sometimes it gets overlooked because nobody raises it. So
12 that's one issue I just want to put out there.

13 Now, to the extent of the wording, the way it's
14 currently worded, it says: "That until further order of
15 this court, Dalia, along with Dalia's agents, assigns,
16 attorneys and/or anyone acting on Dalia's behalf shall be
17 prohibited from prosecuting the Delaware action," which, I
18 guess, is previously defined in the order as "Genger as
19 Trustee of the Orly Genger 1993 Trust v. TR Investors LLC,
20 et al."

21 You don't actually have an index number there
22 from Delaware.

23 MR. GRIVER: I didn't have an index number.

24 THE COURT: All right.

25 "Or commencing any new actions as trustee of the
26 Orly Trust concerning the matter of the operative complaint

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2 in this action."

3 Now, I know what my concerns are about that
4 language, but I'm curious about what your concerns are,
5 because I'll tell you what I'm trying to do. I have no
6 intention of stopping Judge Keenan from doing as much as
7 he'd like in this case and having them resolve these issues
8 here in New York. But I am concerned that that Delaware
9 action just sort of be put on hold until I can have a
10 reasoned reconsideration of the points. I don't need any
11 second, third, fourth actions there.

12 MR. MEISTER: I don't envision any second, third,
13 fourth actions. But my question would be, your Honor
14 talked about carving out an ability to respond to the
15 counterclaim that the Trumps filed. The other party TPR
16 filed an answer before which does not have a counterclaim,
17 a cross-claim, so we don't have to worry about them, in
18 Delaware.

19 MS. WACHTLER: Well, wouldn't your remedy be in
20 Delaware then to say that you're stayed and that you need
21 to have some sort of --

22 MR. MEISTER: I don't know Delaware procedure,
23 your Honor. I never practiced in their courts. I would
24 think that if your Honor allows the Delaware counsel to
25 answer --

26 THE COURT: It seems to me that if you become

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2 aware after consulting with your Delaware counsel that
3 there's an issue of being precluded, that you come back and
4 ask me for the carve out at that point.

5 I mean at this point --

6 MR. MEISTER: How are they harmed?

7 THE COURT: I don't know that they are, I don't
8 know that you are. That's the whole point. I mean we're
9 all sort of imagining a harm.

10 MR. MEISTER: The harm I imagine is if it were
11 here, I don't know what would happen if counterclaim were
12 unanswered. I would think there's the possibility of a
13 default. I would think there's the possibility that the
14 Trumps can move either for a default judgment or possibly
15 for summary judgment.

16 I would think that if we filed a reply, I guess
17 it's called, to the counterclaim denying their request for
18 relief, et cetera, then everyone's interests would be
19 protected and I would assume once the pleading was over,
20 the next step -- this I know because I've been following
21 peripherally the other action down there -- the next step
22 in Delaware is one goes to the court and askings for a
23 scheduling order, and at that time I presume Mr. Anderson,
24 the Delaware counsel, could apprise the court that the
25 action is stayed.

26 MS. WACHTLER: Wouldn't the Trumps -- wouldn't

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2 you ask the Trumps' consent?

3 THE COURT: My gut reaction is that this is in
4 effect a stay of that action and so that you have the
5 benefit of a stay until such time that it's vacated.

6 MR. GRIVER: When this happened in this case,
7 what the parties did was they got together, they informed
8 this Court about it and put together a stipulation staying
9 the case until procedures in Delaware were completed.

10 I don't see any reason why, although I've never
11 done this in Delaware, I've done this in other
12 jurisdictions and other court systems, there's no reason
13 why the --

14 THE COURT: You don't go to Delaware.

15 MR. GRIVER: I would be happy to provide advice
16 on the issue.

17 MR. MEISTER: Your Honor, I feel confident that
18 if Skadden would agree to a stay, I can't imagine that the
19 court there is eager to hear the case, but I don't know if
20 Skadden is going to agree to a stay. I don't know.
21 They're adversaries. If they have us at a disadvantage,
22 which you've now put us, they may take advantage of it.

23 MS. WACHTLER: Then you have to come back here.

24 MR. MONTCLARE: They have to come back here in
25 with the Trumps.

26 THE COURT: Why don't you talk to them and tell

Proceedings

them what I've done. And if you need to, we'll give you
the carve out.

(Proceedings concluded.)

* * *

C E R T I F I C A T E

I, Debra Lynn Salzman, an Official Court
Reporter of the State of New York, do hereby certify
that the foregoing is a true and accurate transcript
of my stenographic notes.

A handwritten signature in dark ink, appearing to read 'Debra Lynn Salzman', is written over a horizontal line.

Debra Lynn Salzman, RMR
Official Court Reporter

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TR INVESTORS, LLC, GLENCLOVA
INVESTMENT CO., NEW TR EQUITY I, LLC,
NEW TR EQUITY II, LLC, and TRANS-
RESOURCES, INC.,

Plaintiffs,

V

ARIE GINGER and TPR INVESTMENT
ASSOCIATES, INC.,

Defendants.

Civil Action
No. 6697-CS

Chancery Court Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, November 10, 2011
1 p.m.

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

TELEPHONE CONFERENCE

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES: (via speakerphone)

2 THOMAS J. ALLINGHAM, II, ESQ.

3 ANTHONY W. CLARK, ESQ.

4 Skadden, Arps, Slate, Meagher & Flom LLP
for Plaintiffs

5 STEPHEN P. LAMB, ESQ.

6 JOSEPH L. CHRISTENSEN, ESQ.

Paul, Weiss, Rifkind, Wharton & Garrison LLP
for Defendants

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1 THE COURT: Good afternoon. May we
2 have appearances for the record.

3 MR. ALLINGHAM: Yes. This is Tom
4 Allingham at Skadden Arps, Your Honor. And with me,
5 if it's acceptable to the Court, is Tony Clark and
6 some members of my team.

7 THE COURT: Sure.

8 MR. LAMB: Your Honor, this is Stephen
9 Lamb from Paul Weiss, and on the phone with us is my
10 associate, Joseph Christensen.

11 THE COURT: Well, the reason I'm
12 calling is, I got a flurry of correspondence. And,
13 you know, I want to figure out how to -- a sensible
14 way of moving forward, which has been rather difficult
15 to achieve over a number of years in this matter.

16 I regret the fact that this family is
17 so riven -- and I'm talking about the Genger family --
18 is so riven that the time of three court systems is
19 taken up with them. I -- I found the transcript that
20 was cited to me rather dismaying. And I feel the need
21 to say something on the record that I am going to
22 order be sent to the judges involved, which is the
23 following about the Court of Chancery:

24 I have been a member of the Court of

1 Chancery since 1998. If there was an occasion on
2 which I ordered action in the absence of a party who
3 was affected, I, frankly -- I can't even recall it.
4 It is a historic practice of this Court to match its
5 willingness to act with speed with a deep commitment
6 to due process.

7 The first thing that this Court, and
8 this judge in particular, makes sure, is that all
9 interested parties always have an opportunity to
10 appear before the Court and that the Court does not
11 act on an ex parte basis. That is a tradition in
12 Chancery. Other courts have different traditions, but
13 the tradition of proceeding with all parties
14 represented and only employing an ex parte proceeding
15 in the most exigent of circumstances is the one that
16 persists in Chancery.

17 So nonimpulsive is my involvement in
18 this matter, that the intricacies of the separate
19 action involving Orly and her mother are simply not
20 complications which have burdened my simple mind.
21 There is no impulse on my part to take action in any
22 of these matters that is not properly briefed up, with
23 every party with an interest having a full and fair
24 opportunity to participate. In fact, I believe I made

1 that clear earlier in this very litigation when I set,
2 I believe at Arie Genger's instance, a more relaxed
3 briefing schedule than the Trump parties wished.

4 It is dismaying to see words like --
5 and I'm going to quote -- "fix," end quote, be used in
6 any way that is suggestive that this Court would
7 facilitate a nonadversarial resolution to the
8 detriment of a party with a legitimate interest. If
9 someone wants to engage in loose talk about gamblers
10 or boxers, that's fine. It's pretty shocking to be
11 used about the Delaware Court of Chancery.

12 One of the other historic traditions
13 of this Court is that we do not lightly cause train
14 wrecks. To the extent that there are reckless,
15 irresponsible folks who are willing to play games of
16 chicken with important things, we don't tend to
17 contribute to the brinkmanship. It's not our style.
18 It's not mine.

19 In terms of how we're going to proceed
20 with this case, I'm going to ask Mr. Lamb a very
21 specific question in a minute. But if the answer to
22 that question is no, that his client has no intention
23 to do something in particular, then my inclination is
24 going to be to put off the oral argument in this case

1 to allow the federal court to issue the ruling it said
2 it was willing to issue in early December and to see
3 what light that might shed for folks on a murky and
4 confusing situation that is motivated by family and
5 personal dynamics that I, frankly, don't grasp.

6 I have no skin in this fight other
7 than the normal skin of a judge assigned a case. The
8 idea that this Court has any other interest is,
9 frankly, wrong. The idea that, to the extent that
10 this Court is worried that there was part of its
11 ruling that was reversed by the Supreme Court, as both
12 of the excellent lead litigators on the phone have
13 experienced in different roles, that's just a reality
14 of the judicial system. We all move on. And it's
15 just really interesting for anyone to suggest to
16 another court that there's some sort of fix on. And I
17 understand one can read the transcript to suggest that
18 that's really something involving Genger family
19 dynamics; but it was a lot of loose language, a lot of
20 it.

21 And so, again, I want to reiterate,
22 the one court that you can most rely upon anywhere not
23 to act on an ex parte basis when that would not be
24 appropriate would be the Delaware Court of Chancery.

1 There is no example in handling this matter over the
2 years of this Court impulsively doing that, no example
3 of any party with a legitimate right to be heard being
4 denied that opportunity. None. I'm not sure why one
5 can confidently say that that's always -- that the
6 courtesies of similar notice were always extended in
7 other jurisdictions, but in Delaware, they universally
8 have been. And I don't consider anything about the
9 present fight to be an emergency that would impel me
10 in any way to deny any party their opportunity to be
11 heard.

12 So my inclination is, honestly, to the
13 extent that my good federal colleague was willing to
14 actually take on the consideration of his thoughts
15 about a knotty jurisdictional matter, recognizing the
16 supremacy of the federal courts and as -- and the
17 inability of this Court to enjoin, if it wanted to --
18 and I rarely want to. I don't go around enjoining
19 litigants. I think you'll find a very limited use of
20 that technique by me. And to the extent it was used
21 in the present case in any way brought on by rather
22 extraordinary circumstances, it seems to me it would
23 be useful for all to hear from the good federal judge.
24 And if it is really true that Arie Genger has no

1 intention of trying to seek an injunction from a state
2 judge about the procession of this action, then I
3 don't see any reason why we can't get a ruling from
4 the federal court.

5 And since I have probably had to do
6 more work on these cases than any of my good federal
7 colleagues or my good state colleagues in whom I have
8 a lot of confidence, I'm perfectly happy to approach
9 the Macy's Thanksgiving Day parade and the Christmas
10 season free of worrying about the Trump Group or the
11 Genger family and concentrate on my other judicial
12 matters and seeing what new float will fly above the
13 streets of New York and then to hear what a wise
14 federal judge thinks early in next year and then take
15 up the action from there.

16 But if Mr. Genger is going to run in
17 to court in New York and seek to enjoin the Trump
18 Group or in any way interfere with the governance of a
19 Delaware entity and to do it, you know, in the
20 meantime, then, I can't proceed in that way. And the
21 way I will proceed is the way the Trump Group has
22 suggested, which is I will simultaneously hear their
23 application for an injunction, along with the
24 dismissal motions. That seems to me to be an

1 inefficient and unnecessary thing; but unless
2 Mr. Genger is willing to make a binding commitment not
3 to seek to -- a judicial ruling interfering with this
4 action, I don't really see how I can deny the Trump
5 Group the opportunity to present their injunction
6 application. It's not my preference that I add to my
7 burden, but I need something binding.

8 It would also be helpful to know a
9 little bit more from Mr. Lamb about the extent to
10 which he and Mr. Christensen are involved in the
11 strategy in New York. It's -- you know, frankly,
12 there was no secret that Orly and her father are
13 close. The judge in New York seems to recognize a
14 sort of divide in which mother and son are against
15 father and daughter. It's sad. It's genuinely sad to
16 see a family riven like this. And it's obviously
17 difficult, though, you know, when you have a situation
18 where other people's interests are caught up in a
19 family fight.

20 But the idea that Arie Genger is not
21 communicating with Orly Genger is not immediately
22 apparent. And it is kind of dismaying, this notion
23 of, for example, that some -- that counsel for Arie
24 Genger would sit before the Court in New York and be a

1 party to this kind of colloquy that suggests that
2 actually action could have been taken somehow. I
3 mean, really, there's absolutely no way that any
4 action would be taken in this Court that would affect
5 either of these cases without incredibly rapid action
6 by Mr. Lamb and Mr. Christensen. They're just too
7 good a lawyers. And there's also no way it would
8 happen because there's no way they wouldn't get notice
9 from Mr. Allingham.

10 So, you know -- but when you see -- I
11 take very seriously the reputation of this Court and
12 the perception about its fairness. And it was good to
13 see my judicial colleague in New York resist this kind
14 of inflammatory -- I think was the word used aptly by
15 Mr. Lamb. But it's not just inflammatory. It really
16 went a long way to being misleading and insulting.
17 And -- and I don't mean personally. I don't really
18 care when they mean -- when they talk about the worst
19 judge in the world. I took that actually to mean if,
20 on the merits of the economic ownership, you have a
21 judge who's already ruled one way and that way is
22 adverse to your interests, you probably don't want
23 that judge to decide it. I mean, I -- I'm a very
24 thick-skinned person who's lived in a much more

1 intensive world than any litigation.

2 So -- but it's more the insinuation
3 that this Court would somehow be acting impulsively
4 and without regard to the due process rights of the
5 litigants. And for people to be suggesting that,
6 frankly, in counsel for Arie Genger's presence, I just
7 have a hard time believing, frankly, that the -- the
8 distinguished lawyers who are representing Arie Genger
9 here were really quite involved in that.

10 So I'm going to finish with that. I
11 know it's -- it's extensive, but it's important that
12 this be on the record. And I want it transmitted to
13 my judicial colleagues, and I want it transmitted
14 jointly without commentary.

15 Mr. Lamb, what I'm asking you is: Is
16 your client committing to this Court that he's not
17 going to seek an injunction against the procession of
18 this action in the New York state courts?

19 MR. LAMB: Your Honor, I am -- don't
20 have any authority from my client to say that in so
21 many words, but I'm sure it's true. As I said in my
22 letters, we have never done anything to interfere with
23 the procession of this Court -- of this case in New
24 York or anywhere. As Your Honor knows, what we've

1 done instead is moved to dismiss and to stay and,
2 quite frankly, devoted very substantial resources to
3 briefing the issue without any thought of interfering
4 with Your Honor's ability to hear it.

5 I feel confident, confident, Your
6 Honor, that I can commit that there is no intention to
7 do that, no plan to do that, and that we will not do
8 that.

9 As to the other matters Your Honor has
10 raised, I, of course, also -- I mean, let me say I --
11 I have some involvement in -- in the New York matters,
12 as Mr. Allingham knows. I have -- I've seen him at
13 least on two occasions, once in the New York state
14 Supreme Court, not on the day of the transcript that
15 was sent to Your Honor, and once in the federal
16 District Court.

17 I -- I have no -- I take no -- I
18 certainly eschew any responsibility for the things
19 that were said. Your Honor, I believe that the way
20 you are interpreting them is how they were meant. It
21 was no commentary on Your Honor's fitness as a judge
22 or the fitness of the Court, of any Delaware Court
23 but, rather -- rather, that a question of why a
24 fiduciary such as Orly's mother would choose to bring

1 a case in a court that had already ruled against her.

2 And as to the comment about the fix
3 being in, I believe that also -- I understand that
4 also was directed at understandings between
5 Mr. Allingham's clients and TPR and Dalia Genger or
6 whomever but not the Court. It is, I think, as
7 Justice Feinman pointed out, it was a very poor choice
8 of phrase. And when that is, I think quite honestly,
9 by Your Honor taken, as taken in the wrong way, and I
10 think it should be.

11 But leaving that aside, I mean, I -- I
12 have involvement in the strategy of litigating this
13 case in New York where the Delaware Supreme Court said
14 it should be litigated. You will recall, Your Honor,
15 that when the mandate issued, there were already in
16 different courts in New York two matters -- two
17 litigations that raised all these problems. It is
18 Mr. Allingham and his clients who have chosen to
19 embroil the Court of Chancery in this again by filing
20 this case that we've moved to dismiss.

21 So I -- I'm confident, as I said, that
22 between Justice Feinman and Judge Keenan, they will
23 work out where the matter will progress, whether it's
24 going to be in state court or in federal court. I

1 think it is just unfortunate that Your Honor has been
2 brought -- dragged back into this matter by the
3 Trumps' filing this complaint they filed that. And
4 for all the reasons I've already said, we've stated in
5 our briefs, you know, they lack jurisdiction over
6 Mr. Genger. You lack -- or your Court lacks
7 jurisdiction over the matter, and so on and so forth.
8 In any event, it's the third-filed action and it
9 shouldn't proceed.

10 Your Honor, I --

11 THE COURT: No. And, Mr. Lamb, I
12 appreciate that. And you -- and I just want to say on
13 the record again, I think one of the things that was a
14 bit dismaying about the transcript was that there was
15 nothing in my reaction to this new lawsuit which
16 suggests that I'm not totally impartial in hearing
17 your perspective on the prior-pending litigations. In
18 fact, that's why I set the schedule the way I did.

19 MR. LAMB: I appreciate --

20 THE COURT: And -- and what I'm --
21 where I am now, though, is I actually, having been
22 involved in this -- you know, we're back where we
23 were; right? We were at one point in three courts,
24 but it was a -- a matter involving, you know, who

1 controlled a Delaware corporation. I ended up going
2 first. I think there would be substantial utility to
3 hear from my distinguished federal judicial colleague.
4 And to the extent that the Trump Group is willing to
5 complete the briefing on that and hear from the
6 federal court, you could all provide me with short
7 letters after what -- after, I believe it's Judge
8 Keenan; right?

9 MR. LAMB: It is Judge Keenan, Your
10 Honor. I wouldn't expect that any of this will be
11 decided before Christmas.

12 THE COURT: Yeah. I understand.

13 MR. LAMB: It may be substantially
14 later than that. The briefing schedules are just now
15 being set and will require filing briefs and argument,
16 and so forth. I'm sure it will be sometime next year
17 before any of that's decided by Judge Keenan.

18 THE COURT: Well, all I'm suggesting
19 is -- you know, I had seen a suggestion that Judge
20 Keenan was willing to step in, make a determination
21 that would provide -- shed some important light. I
22 think that would be very useful and it might provide a
23 way forward.

24 MR. LAMB: Well, in any event, Your

1 Honor, the issue of -- that we've raised in our motion
2 will have to be -- unless this action that we're
3 addressing today is simply stayed, which we could do,
4 the issue is going to have to be resolved.

5 THE COURT: No. I understand. But
6 what I'm -- what I heard -- and what I read -- and
7 maybe Mr. Allingham -- and I cannot spend too much
8 more time with you gentlemen, which you're probably
9 glad of, for -- but the -- I -- what I read the Trump
10 Group to be saying is that if Judge Keenan were to
11 determine that he would decide all the issues, that
12 your preference -- again -- and I don't take this
13 personally -- your legitimate preference to be in New
14 York, right?

15 MR. LAMB: Oh, I think it's our
16 preference to be in state Supreme Court.

17 THE COURT: Oh, no, no. I understand
18 that. But --

19 MR. LAMB: In any event, it seems,
20 Your Honor, what you're -- what you're getting at is
21 that Mr. -- that the Trumps, with their sort of
22 offering to Your Honor is to trade this case that
23 should be dismissed for some -- some --

24 THE COURT: I'm not offering to trade

1 anything. I'm saying --

2 MR. LAMB: Not you, Your Honor; the
3 Trumps.

4 THE COURT: I'm saying the objective
5 reality is this: There are cases in three courts. We
6 went down to two courts for awhile. We're now back to
7 three courts. Even if I dismiss this case, we're back
8 to two courts. It just might be -- I'm not ruling out
9 anything. But I do take very seriously that if a
10 federal judge determines that he is going to go and do
11 something that has effect on the shape of things -- if
12 he decides, for example, Mr. Lamb, that he's deferring
13 to the New York state court or to the Delaware courts,
14 I'll go next. It's just your clients, frankly, don't
15 want me to go at all.

16 So the answer that they want me to go
17 before Judge Keenan, I'm sorry, that doesn't move me.

18 MR. LAMB: Well, that's fine, Your
19 Honor.

20 THE COURT: What I'm saying is I
21 believe we're handling this in a way that doesn't put
22 any -- you know, I mean, you can make an argument --
23 I'm sure the Trumps can make an argument that the
24 nonprocession of the lawsuits actually hurts them most

1 of all because it is them who are continuing to be
2 inmeshed in a Genger family dispute. And --

3 MR. LAMB: Well, Your Honor ---

4 THE COURT: -- and all I'm saying --
5 and I'll be real candid about this. I have often
6 seen -- one of the great things we know about this
7 Court is that people are happy to watch us go ahead
8 and do a lot of work. And I'm not saying that the
9 federal judge -- I saw a federal judge, from what I
10 saw, was willing to step up and give useful guidance
11 to people. Federal judges have some power that those
12 of us in state courts don't.

13 And so what I'm suggesting is if
14 Mr. Genger will make the commitment in a formal way so
15 it's -- I have no doubt we're trusting your word; but,
16 honestly, Mr. Lamb, respected counsel in these cases
17 before has had situations occur where -- without their
18 knowledge. And so if we can get that binding
19 commitment from Mr. Genger, what I'm suggesting is
20 that you-all get back before Judge Keenan, get it on
21 his schedule. Nobody's going to enjoin anybody from
22 going forward with this case, but I have no intention
23 to do anything in this case until we hear from Judge
24 Keenan. You can all put in short letters about how

1 that affects what you've already written and we'll go
2 from there.

3 MR. LAMB: That's fine, Your Honor.
4 We're happy to take the -- take the matter off Your
5 Honor's plate. And I will provide the Court with a
6 letter to the effect that you're asking, hopefully by
7 the end of the day, if not tomorrow.

8 THE COURT: Mr. Lamb -- I mean
9 Mr. Allingham, does that work for you?

10 MR. ALLINGHAM: Your Honor, I -- I've
11 managed not to say anything at all to this point.

12 Last -- yesterday afternoon, Justice
13 Feinman issued another TRO enjoining us from taking
14 any action at all in the Orly Trust declaratory
15 judgment matter in which the trust seeks a declaration
16 that it is the beneficial owner of the Orly Trust
17 shares.

18 I -- I think that what Your Honor has
19 proposed, notwithstanding that we are now the subject
20 of at least two TROs plus a pending preliminary
21 injunction application brought by both the Orly Genger
22 Trust and the -- and Arie Genger in Judge Feinman's
23 court --

24 THE COURT: Where -- what --

1 MR. LAMB: Which has nothing to do
2 with this action, Your Honor.

3 MR. ALLINGHAM: Well, yes, Your Honor,
4 it does; but Mr. Lamb and I can -- can -- can contest
5 that later on.

6 THE COURT: Does this have to do with
7 the other action before me?

8 MR. ALLINGHAM: One of --

9 MR. LAMB: Yes.

10 MR. ALLINGHAM: The one entered
11 yesterday afternoon does. The one pending before
12 Justice Feinman imposes extraordinary constraints on
13 what the Trump -- Trump Group can do with respect to
14 TRI, including it would enjoin us from issuing any
15 shares of the company in any context because that
16 would dilute the so-called Arie and Orly Trust shares.

17 MR. LAMB: Your Honor, that
18 preliminary injunction application has been argued and
19 is, as I -- tell me, Mr. Allingham, has it been argued
20 or is it just a TRO at this point? There's a PI
21 coming up and --

22 MR. ALLINGHAM: It has been argued on
23 a preliminary injunction basis and it is sub judice.

24 MR. LAMB: Sub judice, Your Honor.

1 MR. ALLINGHAM: And Justice Feinman
2 indicated yesterday that he was working on an opinion.
3 So --

4 THE COURT: See, and this is the
5 thing. My simple mind doesn't really divide among
6 these actions. As I said before, I really know
7 nothing about the Orly action or the Dalia action,
8 however you wish to call it, because nothing has been
9 done.

10 MR. ALLINGHAM: Your Honor, if I
11 may -- and I know the Court is -- is pressed for
12 time -- we -- we -- I -- I lack authority as well.
13 I -- I would like to talk to my clients. I think that
14 what Your Honor has proposed is extraordinarily
15 sensible; but we do have some complicating --
16 complicating factors, including this preliminary
17 injunction application pending before Justice Feinman.
18 One possibility might be that the parties simply agree
19 to stay the state court proceeding voluntarily
20 throughout to permit Judge Keenan to act. But let
21 me --

22 THE COURT: Yeah. Why don't --

23 MR. ALLINGHAM: If you would permit,
24 let me consult with my clients, and I will commit to

1 provide the Court with a response by the end of the
2 day.

3 THE COURT: Yeah. Well, why don't you
4 do this: Why don't you -- before anybody sends me
5 anything, make sure you and Mr. Lamb speak directly.

6 And let me again reiterate. I'm not
7 doing anything impulsive. The idea that people are
8 running around taking a busy judge and getting TRO
9 applications -- you know, one of the easiest TRO
10 applications that ever would have been granted to Orly
11 Genger would have been one in the Orly Genger action
12 pending before me, to say, "Your Honor, I just want a
13 clarification that until my counsel are heard, you're
14 not going to do anything." I would have found it
15 humorous because I would have said "I'm happy to
16 provide this obvious answer to you for insurance"
17 because I never the heck would have done it.

18 So I -- I understand when we're --
19 when we talk about "this action," just limited to a
20 civil action number --

21 MR. LAMB: Yes, sir.

22 THE COURT: -- that's a little --
23 everybody's -- there's a big kind of family dispute
24 that's tying up both the family, the Trump Group, and

1 the underlying business. And I think what people need
2 to get clear with each other is how are they going to
3 spend their time? Is there going to be coordination
4 among counsel so that the people don't say "Oh, well,
5 that's just the Orly action"? Because I don't really
6 intend -- I mean, again, I was -- I'm not even sure
7 what the Orly action is, I'll confess. I don't go
8 around reading every complaint that's filed with me
9 because I would never get to do the actual motions
10 that are pending.

11 But I think what -- it sounds like --
12 I think the two of you, if you discuss this with a
13 cool head and a warm heart -- and, honestly, I even
14 thought about bringing in Orly and what's counsel. I
15 think you ought to talk to them, and you ought to
16 figure out what's going on so that we stop this. I
17 mean, I -- you know, I, frankly, am -- I do find some
18 of the proceedings disorienting. And, Mr. Allingham,
19 can I make a suggestion to you and your team?

20 MR. ALLINGHAM: Of course, Your Honor.

21 THE COURT: Do not skip any proceeding
22 in New York that you know anything about.

23 MR. ALLINGHAM: I take the point, Your
24 Honor.

1 THE COURT: If you need to occupy the
2 doorstep to the courthouse, to pick a term of the
3 moment, occupy it.

4 MR. ALLINGHAM: Understood, Your
5 Honor.

6 MR. LAMB: Your Honor, just for
7 clarity, I'm not aware -- I -- I'm quite sure that any
8 application that's been made since the summer of 2010
9 has been on notice to Mr. Allingham. And --

10 THE COURT: Oh, no, no. And that was
11 my point. I believe there was something about this
12 one transcript where they had been told it really
13 didn't affect Arie and they didn't show up.

14 MR. ALLINGHAM: It didn't affect the
15 Trump Group, Your Honor.

16 THE COURT: Okay. And I just think --

17 MR. ALLINGHAM: Yes, I understand.

18 THE COURT: -- it's such a complicated
19 web of family and business relationships, that it's
20 just not wise. And I don't think it helps Judge
21 Feinman. None of us want unnecessary party -- that's
22 why I said. I thought about Orly and whatever, but
23 it's not this case. And I urge you to share this
24 immediately with both their counsel and to share it

1 with the world.

2 I'm going to finish with this: I
3 appreciate the prompt getting-together. I'm not going
4 to do anything impulsive. I'm not going to do
5 anything without full participation of all interested
6 parties. We just don't do that in Chancery. I'm also
7 happy to talk to any of my judicial colleagues, if
8 anybody thinks that's sensible. But I do think
9 getting a ruling from Judge Keenan has got to be a
10 useful thing even if you assume this Court wasn't even
11 in the mix.

12 And so to the extent that he's willing
13 to step up, that's something that I am extremely
14 grateful for as a judicial colleague. I've spent an
15 awful lot of time on this case. And if somebody wants
16 to take a crack at something that will help all the
17 parties move forward, I applaud that and I applaud the
18 cooperative spirit of your -- the participation by
19 counsel today. And I will see you-all soon. Some of
20 you sooner than later, I think.

21 MR. LAMB: Yes. Sooner than later
22 here.

23 THE COURT: Okay.

24 MR. ALLINGHAM: Thank you, Your Honor.

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THE COURT: Take care.

MR. LAMB: Thank you.

(The proceedings concluded at 1:31 p.m.)

- - -

CERTIFICATE

I, NEITH D. ECKER, Official Court
Reporter for the Court of Chancery of the State of
Delaware, do hereby certify that the foregoing pages
numbered 3 through 26 contain a true and correct
transcription of the proceedings as stenographically
reported by me at the hearing in the above cause
before the Chancellor of the State of Delaware, on the
date therein indicated.

IN WITNESS WHEREOF I have hereunto set
my hand at Wilmington, this 11th day of November 2011.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

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Case No. 3994-VCS



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TR INVESTORS, LLC, GLENCLOVA
INVESTMENT CO., NEW TR EQUITY I,
LLC, NEW TR EQUITY II, LLC, and
TRANS-RESOURCES, INC.,

Plaintiffs,

v.

ARIE GINGER,

Defendant.

Civil Action No. 3994-VCS

ARIE GINGER,

Counterclaim Plaintiff,

v.

TR INVESTORS, LLC, GLENCLOVA
INVESTMENT CO., NEW TR EQUITY I,
LLC, NEW TR EQUITY II, LLC, and
TRANS-RESOURCES, INC.,

Counterclaim Defendants.

MEMORANDUM OPINION

Date Submitted: October 30, 2009

Date Decided: December 9, 2009

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STRINE, Vice Chancellor.

I. Introduction

Plaintiffs TR Investors, LLC, Glenclova Investment Co., New TR Equity I, LLC, New TR Equity II, LLC, and Trans-Resources, Inc. (collectively, the “Trump Group”) seek sanctions against defendant Arie Genger for causing computer “wiping” software to be employed to destroy all the information on the unallocated space of TRI’s computer database. Genger’s conduct occurred in the midst of expedited litigation over the control of Trans-Resources, Inc. (or “TRI”). In connection with that litigation under 8 *Del. C.* § 225, attorneys for TRI worked with Genger throughout the weekend of September 5-7, 2008 to identify and segregate documents on TRI’s computer system that were personal to Genger and not related to the business or affairs of TRI. This work was in anticipation of Genger’s potential involuntary relinquishment of control over TRI to the Trump Group.

After the attorneys for TRI had left on September 7, 2008, Genger had a conversation with Oren Ohana — the computer consultant he had long employed to assist both TRI and himself personally — about the computer work the attorneys (and their technology consultants) had performed throughout the weekend. As a result of that discussion, Ohana was authorized by Genger to take measures to destroy information on TRI’s computer system. That conduct was a violation of a status quo order entered on August 29, 2008 (the “August Status Quo Order”) in connection with the § 225 dispute, which provided in relevant part that “the parties to the [§ 225 dispute] . . . are hereby restrained and enjoined from,

directly or indirectly . . . tampering with, destroying or in any way disposing of any Company-related documents.”¹ Before embarking on that course of document destruction, Genger did not consult with counsel for TRI despite his awareness of the terms of the August Status Quo Order, and the fact that counsel had been working with him throughout the weekend of September 5, 2008. Consistent with Genger’s failure to consult counsel before acting, Ohana acted in the dead of night to wipe the unallocated portions of the TRI server clean. Like people who do things in the dark that they do not wish others to know about, neither Genger nor Ohana later informed TRI, its counsel, or the Trump Group about the use of the wiping software. In other words, Genger and Ohana tried to keep their activities secret.

But, once the Trump Group gained control over TRI, the wiping activity came to light. The revelation of this misconduct coincided with the unraveling of a settlement of the § 225 action, and has resulted in an expensive case within a case. While the parties dueled over whether the Trump Group properly exercised consents to replace the TRI board, they also spent enormous resources on whether Genger’s actions constituted contempt of court and spoliation of evidence and, if so, what the appropriate consequences were.

In this opinion, I resolve the parties’ feud regarding Genger’s destruction of information. Although I reject the Trump Group’s preferred remedy of entering a default judgment against Genger in the § 225 action, I conclude that a potent

¹ JX-2 (Status Quo Order (Aug. 28, 2009)).

remedy is justified by Genger's intentional violation of a clear judicial order and contempt of this court. Moreover, I conclude that Genger intentionally sought to reduce the base of information available to the Trump Group in the § 225 action, and that, even more indisputably, his conduct was reckless — both findings that render him accountable for spoliation.

In the § 225 action, Genger contends, through a variety of legal and equitable theories, that the Trump Group does not have majority voting power despite ownership of a majority of the equity of TRI. Because Genger's destructive conduct had the effect of preventing the Trump Group's access to the full array of information that should have been available in the § 225 action, I conclude that a proportionate and fitting remedy is to require Genger, as to any affirmative defense or counterclaim raised by him in the § 225 action, to meet his burden of persuasion by meeting an evidentiary burden one level higher than would otherwise be applicable. Thus, if Genger would otherwise have to meet a mere preponderance standard, he will now have to prevail by producing clear and convincing evidence. Additionally, because his secretive conduct has left me with serious doubts about his credibility and because that conduct rendered the documentary record incomplete, Genger will be unable to meet his burden of persuasion if the only evidence on a contested matter is his own testimony. Rather, he will need to present corroborating evidence, either in the form of documents or another person's testimony, to meet his burden. To supplement this relief and directly address Genger's shrinking of the evidentiary record, I order

Genger to turn over certain relevant documents to which he had made a claim of privilege.

Having found Genger to be in contempt and to have destroyed relevant evidence, I must also balance his actions against some disconcerting actions of the Trump Group following Genger's violations. In rejecting a more extreme order, I give weight to conduct by the Trump Group after they took over control of TRI. That conduct, while in a grayer area than Genger's, also showed disrespect for stipulated court orders, illustrating the high stakes the Trump Group and Genger place on their dispute over control of TRI and both side's willingness to employ sharp elbows. Although not a factor that disentitles it from any relief at all, the Trump Group's behavior convinces me that justice requires that an adjudication resolve this ownership disagreement, if, as seems likely, the Trump Group and Genger are unable to settle their differences in a rational, consensual manner.

Finally, because Genger violated an important order of this court and failed to own up for his misconduct in a timely way, an award of attorneys' fees is warranted. In that connection, I suggest an amount that strikes me as reasonable in light of what was at stake, and that is consistent with my impression that both sides have engaged in overkill.

II. Factual Background

These are the facts as I find them after trial.

A. The Trump Group Purports To Remove Genger From The TRI Board Of Directors

As of June 2008, defendant Arie Genger was the Chief Executive Officer of TRI, a company that he founded. At that time, the Trump Group owned a large, but non-majority, bloc of the outstanding TRI stock.² The Trump Group brought large amounts of financial capital to the table that helped TRI out of an earlier credit crunch, and that resulted in its ownership of its initial 47% interest in TRI. From the record, one senses that Genger and the Trump Group bring a similar mindset to business. Although they seemed to work together cooperatively to advance TRI's interests, Genger and the Trump Group viewed business as business, and neither would hesitate to seize an advantage, even if that advantage meant causing commercial injury to someone else, regardless of whether one had served with that someone else on a board for several years.

In 2007 and 2008, TRI fell behind in making payments to its largest lender, Bank Hapoalim.³ In the spring and summer of 2008, the Trump Group and Genger began to work together to re-finance TRI's debt to Bank Hapoalim.⁴ One difficulty that both Genger and the Trump Group were interested in avoiding was putting in place a change in ownership structure that might inspire a legal challenge from Sagi Genger, Genger's son.⁵ Arie Genger had a bitter divorce from Sagi's mother, and has been estranged from his son for several years. It

² Tr. at 140:15-17 (Hirsch).

³ *Id.* at 142:4-24.

⁴ *Id.* at 147:6-149:6.

⁵ *Id.* at 152:9-153:15.

seems that as of this time, the Trump Group favored continuing Genger as CEO and working together with him to determine TRI's fate. But the effort to consummate a Genger/Trump Group-sponsored refinancing deal began to unwind in late June 2008 and, ultimately, the parties abandoned these efforts.⁶

With a refinancing out of reach and TRI facing the potential for its creditors to take adverse action, the Trump Group shifted course in a major way. Litigation in this court and another forum broke out in early August 2008 between the Trump Group and Genger over TRI. Then, without any advance notice to Genger, on August 22, 2008, the Trump Group purchased an additional 19% bloc of TRI shares from a trust to benefit Sagi, called the Sagi Genger Trust, for \$26.7 million.⁷ This bloc of shares will feature prominently in the upcoming § 225 trial, because it was transferred by Arie Genger to the trust in connection with his divorce from Sagi's mother, Dalia Barshishat. Arie Genger and the Trump Group have sharply differing views about who gets to vote this bloc. For now, suffice it to say that the Trump Group believed that the purchase of this bloc, along with other shares they own, gave it sufficient voting control of TRI to remove the TRI board and install a new board.⁸ As of August 25, 2008, the original board consisted of five members: Genger and his trusted business associates William Dowd and Avi Pelossof, as well as Robert Smith and Jules Trump, both appointees of the Trump Group.

⁶ *Id.* at 162:2-163:20.

⁷ *Id.* at 140:18-141:4, 163:21-164:10.

⁸ *Id.* at 164:12-165:14.

At a board of directors meeting held on August 25, 2008, the Trump Group delivered written consents of its shares, including those acquired from the Sagi Genger Trust, and proposed to reconstitute TRI's board as follows: first, the Trump proposed to increase the number of directors on the board from five to six; second, the Trump Group proposed to remove Arie Genger from the board and from his position as CEO; and third, the Trump Group proposed that Eddie Trump and Mark Hirsch would take the two new seats on the TRI board.⁹ Because Eddie Trump and Mark Hirsch were Trump Group appointees, the practical effect of this proposal was to eliminate Genger's control over TRI. At the August 28, 2008 meeting, Genger, Pessolof, and Dowd rejected the proposal, believing that the Trump Group did not have the voting power to reconstitute the board.

B. The Section 225 Action Is Filed And A Status Quo Order Is Implemented

TR Investors, LLC, Glenclova Investment Co., New TR Equity I, LLC, and New TR Equity II, LLC promptly filed the § 225 action on August 25, 2008, asking, among other things, for this court to: (a) declare the Trump Group the majority stockholder of TRI; (b) enjoin TRI from recognizing Genger as a director; (c) declare them entitled, as the majority shareholders, to designate and elect two more of their designees to the TRI board, and to continue the terms of Jules Trump and Robert Smith; (d) declare the TRI board to be composed of their four designees — Jules Trump, Robert Smith, Mark Hirsch, and Eddie Trump —

⁹ Pl. Compl. at Ex. A (Action by Written Consent of the Stockholders of [TRI] (Aug. 25, 2008)).

plus William Dowd and Avi Pelossof; and (e) declare invalid any actions taken by a board not comprised of their designees from and after the August 25, 2008 delivery of their written consents. On August 26, 2008, the Trump Group also filed an action under 8 *Del. C.* § 220 asking, among other things, for this court to order TRI to permit it to inspect and copy books and records from TRI.

On August 28, 2008, the parties to the § 225 action entered into a Standstill Agreement, which was scheduled to terminate on September 4, 2008, for the purpose of giving the disputing parties time to try to settle their dispute and, until such settlement was reached or the § 225 action completed, to sort out how TRI would be managed. This Standstill Agreement provided, among other things, “[e]xcept as otherwise provided herein, no action will be taken to prosecute or defend any of the Litigations during the Term of this Agreement.”¹⁰ The next day, the parties submitted a stipulated status quo order (the aforementioned “August Status Quo Order”). Importantly, the August Status Quo Order had a provision that is standard when parties are disputing the control of a business and where there exists a motive for the destruction of unfavorable information. That provision states in relevant part:

Unless and until otherwise ordered by the Court or agreed to in writing by each of the parties to the above action, the plaintiffs and the defendants, and their respective officers, directors, agents, servants, subsidiaries, affiliates, employees, attorneys, advisors and all persons acting in concert or participation with any of them, and each of their successors and assigns, are hereby restrained and enjoined from, directly or indirectly . . . tampering with, destroying

¹⁰ JX-1 (Standstill Agreement (Aug. 28, 2009)).

or in any way disposing of any Company-related documents, books
or records¹¹

Because neither settlement nor a favorable verdict in the § 225 action were guaranteed, Genger faced the possibility that he might lose control of the company he founded twenty-five years ago. Relatedly, Genger faced the prospect that the Trump Group, if it assumed control, would review the documents and files he had accumulated over the twenty-five years he had spent at TRI, not to mention the chance that they would get to see those documents as a result of discovery in the pending litigations. Therefore, at the direction of TRI's outside counsel, Friedman Kaplan Seiler & Adelman LLP ("Friedman Kaplan"), on the weekend of September 5-7, 2008, the entire contents of Genger's TRI office — both physical and electronic — were packaged, sealed, and sent to the office of Genger's personal counsel, Dechert LLP pending the outcome of the lawsuits. The goal of Friedman Kaplan's efforts was not only to segregate the non-TRI documents and to protect Genger's interest in keeping those documents confidential, but also to ensure that all of the documents relevant to TRI's business and affairs were preserved and available both for those managing the corporation and for possible use as evidence by the parties in the pending litigation.

¹¹ August Status Quo Order at ¶ 1.